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NO. 21,105

In the
UNITED STATES COURT OF APPEALS
For the NINTH CIRCUIT

RPTZ-PATCO, INC.,
Appellant,
v.
PACIFIC INLAND NAVIGATION
COMPANY, INC.,
Appellee.

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STATEMENT OF JURISDICTION

This is an appeal from the April 1, 1966 Judgment (C.T. 118)* of the United States District Court for the District of Oregon adjudging that Claims 1, 6, 8 and 11 of Pickrell patent No. 3,033,150 (PX 1) are invalid. The District Court case, Civil Action No. 63,109, was an action for infringement of the patent.

The jurisdiction of the District Court was admitted by the parties and found in the Pretrial Order, Section III, Paragraph 1, (C.T. 98) and was conferred on the Court by 35 U.S.C., §281:

"A patentee shall have remedy by civil action for infringement of his patents."

and 28 U.S.C. 1338(a):

"The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents. . ."

* As hereinafter used, references to the Clerk's Transcript of the Record are indicated by "C.T."; references to the Reporter's Transcript are indicated by "R.T."; and references to Plaintiff's and Defendant's exhibits are indicated by "PX" and "DX", respectively.

A timely notice of appeal from the District Court Judgment was filed on May 17, 1966 (C.T. 136) within the time permitted by 28 U.S.C. §2107. This Court has jurisdiction of the appeal by virtue of 28 U.S.C. §§1291 and 1294.

STATEMENT OF THE CASE

Parties and Origin of Action

RPTZ-PATCO, INC., the plaintiff in the District Court and hereinafter referred to, alternatively, as PATCO or APPELLANT, is the owner of Pickrell patent No. 3,033,150, the patent in suit. Ownership of the patent by PATCO was a fact agreed to by the parties and found in the Pretrial Order, Section III, Paragraph 2 (C.T. 98).

PACIFIC INLAND NAVIGATION COMPANY, INC., the defendant in the District Court and hereinafter referred to, alternatively, as PACIFIC or APPELLEE, was sued by PATCO for infringement of the Pickrell patent No. 3,033,150 by a Complaint filed in the District Court on March 21, 1963 (C.T. 1). In the Complaint, PACIFIC was charged with the unauthorized making and using of

barges incorporating the invention which forms the subject matter of the patent and the relief asked was an injunction against further infringement, damages [with an increase if the Court was persuaded that the infringement was willful] and reasonable attorney's fees. PATCO designated Claims 1, 6, 8 and 11 as those which were to be relied upon in the District Court to support the charge of infringement in the Interrogatory Answers filed in the District Court February 8, 1965 (C.T. 86).

Following trial, the District Court, on March 31, 1966, filed its Opinion (C.T. 118), incorporating its findings and conclusions that the Letters Patent in suit was invalid, and on April 19, 1966, a Decree of Dismissal (C.T. 134) was entered. This appeal is from the Decree of Dismissal.

The Invention of the Pickrell Patent

Pickrell patent No. 3,033,150, hereinafter referred to as the Pickrell patent, is for a barge comprising a combination of elements interrelated to provide an improved construction capable of efficiently handling multiple cargoes (e.g., grain and

petroleum), either separately or simultaneously. The invention of the patent resides, primarily, in the concept of providing a V-shaped cofferdam in the hull of a barge in such a manner as to separate the hull into an upper self-unloading cargo hold having a lower wall defined by the upper wall of the cofferdam and a lower cargo hold having an upper wall defined by the lower wall of the cofferdam and separated from the upper cargo hold by the void provided between the upper and lower walls of the cofferdam. The claims in suit (1, 6, 8 and 11) all define combinations embodying this basic concept.

Barges constructed according to the invention of the Pickrell patent are characterized in that they may carry efficiently either bulk cargoes, such as grain, salt and the like, or liquid cargoes, such as oil, gasoline, liquid fertilizers; or both types of cargo simultaneously. Bulk cargoes are carried in the hold above the cofferdam and thus, due to the V-shaped lower wall of the hold defined by the upper wall of the cofferdam, "self" or gravity unloading of the bulk cargoes is facilitated. Liquid cargoes are carried in the hold below the cofferdam where they are separated from any bulk cargo which may be contained in the hold above the cofferdam by the walls of the cofferdam and the

void provided therebetween. As a result of the latter characteristic, liquid cargoes are effectively isolated from bulk cargoes to the satisfaction of standard safety requirements, such as the Coast Guard Regulations, and cross contamination between bulk and liquid cargoes is prevented.

The District Court, in its Opinion, aptly described the attributes of the invention as follows (C.T. 118-119):

"The cofferdam operates to keep the dry cargo separate from the space underneath which was designed for liquid storage. The design permits each cargo to extend to the weather deck, thus maintaining a low center of gravity. The V-shaped design for the dry cargo is particularly useful in loading and unloading grain. The cofferdam allows access to the void space from either side of the vessel and a clear view of the entire interior may be had from certain vantage points. . ."

Prior to making the invention of the Pickrell patent, Mr. Hugh E. Pickrell, Jr., the patentee, had been employed since 1946, in various capacities in the construction and maintenance of barges and towboats for the North Shore Boatbuilding Co. and its associated or predecessor companies (R.T. 46-47). During this employment, Mr. Pickrell observed shipping on the Columbia



River and its tributaries and became aware that petroleum was typically loaded on barges in the "Portland Area" and unloaded at its destination, namely, Umatilla, Oregon and at Posco, Washington (R.T. 50). Mr. Pickrell also became aware, during this period, that wheat barges were used on the river (R.T. 51) and realized the desirability of constructing a barge which would be facilitated to carry both, or either, petroleum and wheat. At the trial, Mr. Pickrell stated that "we had always wanted to build a barge that would go in both directions and carry a pay load in both directions and also unload the product in a hurry" (R.T. 53). It was realized that such a barge would avoid the necessity of having different barges for use in shipping grain and petroleum, respectively, and the problems and expense encountered in returning these barges from their destinations in empty condition.

It was with the foregoing background that Mr. Pickrell conceived the invention of the patent here in controversy. He first made a sketch illustrating the concept (R.T. 56) and then, over a period of about two months, worked with Bill Buss, the draftsman for North Shore Boatbuilding, to design a barge embodying the invention (R.T. 58). After the design of the barge, Tide-

water Barge Lines, under Mr. Pickrell's auspices, caused two barges to be built incorporating the invention at an investment of about \$600,000 (R.T. 83-87).

The Art Prior to the Invention of the Pickrell Patent

Prior to the invention of the Pickrell patent, a well developed body of art relating to barges and other vessels designed for the shipment of both single and multiple cargoes existed. Of this art, that pertinent to the invention of the Pickrell patent may be categorized as follows:

I. The gravity unloading dry cargo hold art, as typified by the following:

Barge R-76 (DX 37-2, -3, -4)

Barge R-27 (DX 66 and 67)

Barge R-21 (DX 66 and 67)

Patent 2,889,942 (DX 58)

Patent 1,803,105 (PX 6)

Drawings for the "Sinclair-Petrolore" (DX 2)

II. The cofferdam art, as typified by the following:

Barge "Umatilla" (DX 53)

Patent 2,594,930 (PX 6)

The United States Coast Guard Regulations for
Tank Vessels (PX 25)

The art in category I shows barges having V- or W-shaped gravity unloading dry cargo holds, both with and without sumps for cargo collection purposes. The V- or W-shaped holds shown in this art are defined by single walls, or bulkheads, and certain are designed for the storage of liquid such as ballast water, therebeneath. This art does not, however, make any disclosure of a barge combination employing a V-shaped cofferdam wherein the upper surface of the cofferdam defines a dry or bulk cargo hold and the lower surface of the cofferdam defines the upper wall of a liquid cargo hold. For that matter, this art makes no showing whatsoever of a V- or W-shaped cofferdam.

The art in category II shows, or suggests, the employment of horizontal and/or vertical cofferdams between adjacent cargo holds of a barge. The Coast Guard Regulations forming a part of this art further defined the meaning of the term "coffer-

dam" and the circumstances under which cofferdams are required between adjacent holds. These Regulations, in their appendix, even illustrate exemplary forms of horizontal and vertical cofferdams. There is no teaching, however, in these Regulations or any of the other art in category II of the V- or W-shaped cofferdam, or the desirability of such a cofferdam.

The "Sinclair-Petrolore" overlaps these categories, somewhat, in that its design includes a series of V-shaped single skinned dry cargo holds separated from each other by vertical cofferdams. The cofferdams of this design, however, do not extend below the V-shaped cargo holds, nor are they of V-shape. The District Court appreciated the limited pertinence of this design to the invention of the Pickrell patent when, in comparing the design to the art cited of record against the application for the Pickrell patent, it stated (C.T. 122):

"I find that the citing of the Sinclair-Petrolore would not have added anything to the disclosed prior art; . . ."

The art categorized above represents, as a practical matter, the totality of the prior art teachings pertinent to the invention of the Pickrell patent. No evidence, or testimony, was

introduced at the trial before the District Court to indicate that anyone, before Mr. Pickrell, had ever seen, or conceived of his invention. The absence of the invention from the prior art was made evident from the testimony of APPELLEE's own expert witnesses, such as Mr. Spaulding, a professional naval architect, who testified in cross-examination as follows (R.T. 313):

"Q. In your study of those prior art patents, did you see in any one of them a vessel that had a hull and within the hull a V-shaped dry cargo space with a V-shaped cofferdam beneath it and a space below that within the hull for carrying of liquid cargo?

A. No."

The Judgment of Invalidity

In weighing the claims of the Pickrell patent in issue (i.e., Claims 1, 6, 8 and 11), the District Court treated its judgment as involving four (4) issues, as set forth in the Opinion at (C.T. 120) as follows:

"I. Were those interested in the prosecution of the Pickrell patent, both morally and legally required to call the attention of the Patent Office to the teachings of the barge Umatilla, the 'Russell Patent' and the prior Russell barges?

"II. Would these teachings, and the Coast Guard Regulations, not specifically considered, materially add to the 'prior art' which the Patent Office did consider and would such consideration have resulted in the issuance of a patent, if any, with substantially narrower terms than the claims in suit?

"III. Was the Pickrell patent obvious when viewed in the light of the prior art and the disclosures of the Pickrell patent, within the meaning of 35 U.S.C. §103, as construed?

"IV. When applied to the facts in this case, is the presumption favoring the validity of the Pickrell patent controlling?"

The District Court resolved issues I and II in the negative (C.T. 121 and 123, respectively). Thus, in effect, the District Court held that Pickrell patent was not invalid on the basis of either of these issues.

The District Court resolved issue III in the affirmative at (C.T. 123) as follows:

"Defendant argues that the subject matter of Pickrell and the prior art, including the Coast Guard Regulations, was such that the subject matter as a whole would have been obvious at the time of the invention, to a person having ordinary skill in the art to which said subject matter pertained.4/ I agree."

"4/ 35 U.S.C. §103.

"A patent may not be obtained though the invention is not identically disclosed or described as set forth in §102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

It is upon this conclusion that the District Court based its holding of invalidity with respect to Claims 1, 6, 8, and 11 of the Pickrell patent.

Issue IV is concerned with the presumption of validity afforded a patent under the provisions of the first paragraph of 35 U.S.C. §282:

"A patent shall be presumed valid. Each claim of a patent (whether in independent or dependent form) shall be presumed valid independently of the validity of other claims; dependent

of Mr. Pickrell, were discussed and Mr. Glosten also had access at Pacific's main office to the Tidewater plans for Barge 36 (R.T. 263).

Pacific's plan was consummated by Mr. Glosten in his design of the accused barges. While designing these barges, Mr. Glosten went aboard Tidewater Barge 36 or 37 in Portland where it was being constructed (R.T. 258-259). Mr. Glosten also went aboard one of these barges when it was completed and docked at Umatilla (R.T. 260).

After the design of the accused barges, they were constructed by Gunderson Bros. of Portland. Barge 550 was constructed first, with Barges 551 and 552 following thereafter. In 1963, Mr. Glosten was credited with an article appearing in the Pacific Work Boat Magazine of March, 1963 (PX 14), regarding the success and features of Barges 550, 551 and 552.

The District Court found the accused barges to embody in their construction the definition of the Pickrell invention set forth in the patent claims here in suit (i.e., 1, 6, 8 and 11)

(C.T. 132). In its conclusion regarding infringement, the Court also made findings as to the nature of the infringement, should the claims be held valid on appeal, as follows (C.T. 132):

"If the Pickrell patent is declared valid, then I would have no hesitancy in holding that defendant's barges, built, converted and operated by defendant infringed Claims 1, 6, 8 and 11, of the patent in suit in the specifications as set forth in paragraph 2, subdivisions (a), (b), (c) and (d) on pages 8 and 9 of the pre-trial order; that the acts of infringement were knowingly, willfully and wantonly committed and that plaintiff would be entitled to injunctive relief against further infringements."

The Questions Involved

The only questions involved in this appeal were raised by the District Court's treatment of the issues of obviousness under 35 U.S.C. §103 and the presumption of validity under 35 U.S.C. §282. These issues, as discussed in the foregoing remarks, are set forth as Nos. III and IV, respectively, in the Opinion of the District Court (C.T. 120) and the questions raised by the District Court's treatment thereof may be stated as follows:

1. Did the District Court err in holding the invention defined by Claims 1, 6, 8 and 11 of the Pickrell patent obvious within the provisions of 35 U.S.C. §103 and, therefore, unpatentable?

2. Did the District Court err in over-throwing the presumption of validity which attached to Claims 1, 6, 8, and 11 of the Pickrell patent under the provisions of 35 U.S.C. §282?

SPECIFICATION OF ERRORS

The following errors are specified as those which will be urged to support this appeal and represent a regrouping of the points set forth in APPELLANT'S STATEMENT OF POINTS ON APPEAL (APPENDIX I).

1. The District Court erred:

(a) in concluding that the invention of the Pickrell patent defined in the claims in suit was obvious within the provisions of 35 U.S.C. §103;

(b) in applying a hindsight test and relying on the hindsight testimony of appellee's expert witnesses to arrive at this conclusion; and,

(c) in surmizing the following to support this conclusion:

(1) "the subject matter of Pickrell and the prior art, including the Coast Guard Regulations was such that the subject matter as a whole would have been obvious at the time the invention [sic. "was made"] to a person having ordinary skill in the art to which said subject matter pertained." (C.T. 123);

(2) The "Pickrell device, when viewed in the light of the decision in Cuno, and the provisions of 35 U.S.C. §103, as interpreted in Graham v. Deere Co., supra, does not, in the last analysis, portray anything beyond the work of one merely skilled in his calling." (C.T. 127);

(3) "The creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art."

(C.T. 130-131); [The Court here had reference to the V-shaped cofferdam employed in the Pickrell invention]; and,

- (4) Pickrell's testimony, "the Russell Barges and the Russell patent made obvious every feature of his design, with the exception of the cofferdam." (C.T. 132).

(This error represents a regrouping of Appellant's points 1, 2, 5, 6, 11 and 17.)

2. The District Court erred in failing to test obviousness under 35 U.S.C. §103 on the basis of obviousness of conceiving the claimed combination (C.T. 127-128). (This error represents Appellant's point 18.)

3. The District Court erred in concluding that the overwhelming weight of expert testimony was that it would have been a fairly simple matter to modify the earlier devices or to combine features well known in the industry and long in use, and come up with a device following the Pickrell design (C.T. 128); and in its following findings which relate to this conclusion:

- (a) "the overwhelming weight of credible evidence is to the effect that there was nothing unique, novel or

extraordinary in the design of a V-shaped cofferdam" and that the Court could well take judicial notice that such was the fact (C.T. 130); and,

- (b) "...on the entire record that the Pickrell device presented nothing that was not obvious in an architectural sense, nor did it demand new techniques of construction." (C.T. 131).

(This error represents a regrouping of Appellant's points 3, 9 and 14.)

4. The District Court erred in treating the Pickrell invention as residing in a cofferdam, per se, instead of the admittedly novel combination set forth in the claims in suit (C.T. 128).

(This error represents Appellant's point 4.)

5. The District Court erred in finding, in effect, that the Coast Guard regulations, and particularly No. 32.60-10, dictated or rendered obvious the Pickrell invention set forth in the claims in suit (C.T. 129-130) and in finding and concluding the following with respect to the regulations;

- (a) the controlling reason for the inclusion of the V-shaped cofferdam in the Pickrell design was Coast Guard Regulations 32.60-10" (C.T. 130); and,

(b) although the cofferdam was without precedent in the industry, the cofferdam's form and location were, in view of prior developments in the industry, all but spelled out for Pickrell by the Coast Guard Regulations (C.T. 131)."

(This error represents a regrouping of Appellant's points 7, 10 and 15.)

6. The District Court erred in refusing to apply the doctrine of this Court in Twentier's Research, Inc., v. Hollister, Inc., 319 F.2d 898 (1963), to the facts of this case and to hold that the Coast Guard Regulations "created the problem, but did not provide the solution." (C.T. 130). (This error represents Appellant's point 8.)

7. The District Court erred when it found:

(a) "Admiral Murphy's testimony indicates that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention." (C.T. 131); and,

(b) as related to the testimony of Admiral Murphy and the design of the device brought to the Coast

Guard's attention...there was nothing in the actions of the Coast Guard at the time of the review of this design that is in any way helpful to the plaintiff." (C.T. 131).

(This error represents a regrouping of Appellant's points 12 and 13.)

8. The District Court erred in failing to give Appellant the full value of the presumption of validity of the Pickrell patent under 35 U.S.C. §282 and in conceding the following to support its treatment of the presumption: "Although, as previously mentioned, the prior art not considered by the Patent Office would have added nothing material to that which was considered, each article of that art, would have added something to the evidence in this proceeding that the Pickrell design was obvious."

(C.T. 131). (This error represents a regrouping of Appellant's points 16 and 19).

9. The District Court erred in finding the Pickrell patent invalid. (This error represents Appellant's point 20.)

SUMMARY OF ARGUMENT

1. The evidence before the District Court did not establish, within the provisions of 35 U.S.C. §103, that the differences between the subject matter of the claims of the Pickrell patent in suit and the prior art are such that the subject matter as a whole would have been "obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."

2. The District Court, erroneously, failed to test obviousness under 35 U.S.C. §103 on the basis of obviousness of conceiving the claimed combination.

3. The Coast Guard Regulations, at most, led to the creation of the problem solved by the Pickrell invention.

4. The District Court's treatment of Admiral Murphy's testimony as indicating "...that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention" was clearly erroneous.

5. The District Court failed to give Appellant the full value of the presumption of validity of the Pickrell patent to which it is entitled under 35 U.S.C. §282.

6. The claims of the Pickrell patent here in suit are valid and infringed by the accused barges.

ARGUMENT

1. Obviousness under 35 U.S.C. §103

Before undertaking a review of the District Court's treatment of the Pickrell patent under this statute, it will be well to review the plain wording of the statute. The statute, in its entirety, reads as follows:

"§ 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter as a whole and the prior art are such that the subject matter would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made."

Insofar as the instant suit is concerned, the key provision of this statute is believed to reside in its requirement that the "subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." (Emphasis supplied.) This provision requires that the claimed subject matter be considered as a "whole" and tested for obviousness as of the time the invention was made. The latter condition, in effect, forbids the employment of a hindsight test to determine obviousness.

While it is urged that the District Court erred in its application of the statute by treating the invention as residing in the cofferdam per se, rather than the claimed combination as a "whole", appellant relies primarily on the Court's treatment of the obviousness test for the error urged under 35 U.S.C. §103.

The obviousness test for the determination of patentable invention, and the admonishment of hindsight in the application of this test, has long been recognized in the Ninth Circuit, as evidenced by Patterson-Ballagh Corporation v. Perry M. Moss, et al, 201 F.2d 403, 96 USPQ 206 (1953). In the Patterson-Ballagh case, Judge Orr, speaking for the Court, commented:

"Hindsight tends to color the seeming obviousness of that which in fact is true contribution to prior art.";

and cited Diamond Rubber Co. v. Consolidated Rubber Tire Co.,

220 U.S. 428,435 (1911) for this now classic language:

"Knowledge after the event is always easy and problems once solved present no difficulties, indeed, may be represented as never having had any, and expert witnesses may be brought forward to show that the new thing which seemed to have eluded the search of the world was always ready at hand and easy to be seen by a merely skillful attention."

The District Court here, while conceding "the fact that the Pickrell cofferdam was unprecedented" (C.T. 128) and admitting that "the Pickrell patent does a job which no prior design accomplished" (C.T. 124), chooses to rely on the, necessarily, hindsight testimony of the expert witnesses. This can be seen from its following conclusion (C.T. 128):

"The overwhelming weight of the expert testimony is that it would have been a fairly simple matter to modify the earlier devices or to combine features well known in the industry and long in use, and come up with a device following the Pickrell design."

The District Court reached this conclusion in spite of the fact that none of the experts called upon laid any claim to having seen

or conceived of the Pickrell invention prior to its making; and its own admissions as to the novelty and utility of the Pickrell invention, as are well summarized at C.T. 127, as follows:

"Certainly, the Pickrell design is 'new and useful.' It does 'increase the convenience' in loading and unloading the grain carrier, along with the petroleum products. It does 'extend the use' of vessels suited to carrying both cargoes, and it does 'diminish the expense' of the carriers, handlers and producers of those products. It did introduce a safety feature not found in other V-shaped grain carriers, but the same features were involved in Cuno."

The latter quote is taken from that portion of the District Court's Opinion relating to the decision in Cuno Corp. v. Automatic Devices Corp., 314 U.S. 84, 51 USPQ 272 (1941), and the provisions of 35 U.S.C. §103, as interpreted in Graham et al, v. John Deere Co. of Kansas, et al, 383 U.S. 1, 148 USPQ 459 (February 21, 1966). In this portion the Court concluded (C.T. 127):

"The Pickrell device, ---- does not in the last analysis, portray anything beyond the work of one who was merely skilled in his calling."

It is submitted that in thus concluding the obviousness issue on the basis of the Graham decision, the District Court has failed

to apply the guidelines of the Supreme Court set forth in the Graham decision to the invention here under consideration. These guidelines may be found in that portion of the Graham decision quoted by the District Court at C.T. 129 and are here again quoted for the sake of emphasis:

"Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or unobviousness of the subject matter is determined. Such secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy. See Note, Subtests of 'Nonobviousness,' 112 U. Pa. L. Rev. 1169 (1964)."

The District Court's failure to apply the guidelines of the Supreme Court in the Graham decision is believed demonstrate in the following representation wherein the factual inquiries directed by the Supreme Court are applied to the Pickrell invention:

I. The scope and content of the prior art.

Here the prior art has been shown to contain: barges with single walled V-shaped cargo holds, as demonstrated, for example, by Barge R-76 (DX 37-2, 37-3); dual cargo barges with horizontal and/or vertical cofferdams, as demonstrated, for example, by the barge "Umatilla" (DX 53) and U.S. Patent 2,594,930 to Hudson (PX 6); and, the regulatory requirement that, under certain circumstances, cofferdams in a general sense be provided between specified classes of cargoes [see the United States Coast Guard "Rules and Regulations for Tank Vessels (PX 25)]. The prior art has not been shown to encompass within its scope, however, a

V-shaped cofferdam in a dual cargo vessel. This much is admitted by the District Court (C.T. 128).

II. The differences between the prior art and the claims at issue.

It is here noted that the claims measure the invention and that the claims in issue (1, 6, 8 and 11) each defines a dual cargo vessel having a V-shaped cofferdam adapted to separate a liquid cargo carried therebelow from a dry cargo carried thereabove and to facilitate the self unloading of the dry cargo. The prior art differs from the claims in issue in that it lacks the teaching of a barge having a V-shaped cofferdam or, for that matter, any teaching at all of a V-shaped cofferdam.

III. The level of ordinary skill in the pertinent art.

This has been aptly demonstrated by the testimony of the architect of the accused barges, Mr. Glosten, and the parade of Appellee's expert witnesses who followed him. Specifically, Mr. Glosten (called by the Appellant) testified that prior to Appellant's Barge 36 he had never seen a V-shaped cofferdam (R.T. 280-281). Appellee's expert witnesses made similar admissions [see, for example, the testimony of Mr. Spaulding (R.T. 313)]. It is also significant that neither Mr. Glosten, nor Appellee's expert witnesses, laid any claim to having conceived the concept of a barge having a V-shaped cofferdam before having been alerted to the invention of the

patent in suit. Their con-
ceptions of what was obvious
were all made in "hindsight"
fashion.

Against the background demonstrated by the above analysis; the aforementioned concession and admissions of the District Court; and the established treatment of the obviousness test by this Court, Patterson-Ballagh Corporation v. Perry M. Moss, et al, supra, it is believed clear that the Appellee has not established that the Pickrell invention defined by the claims here in suit would have been obvious within the provisions of 35 U.S.C. §103. Accordingly, it is respectfully urged that the District Court erred in finding the claims invalid on the basis of this statute.

2. The District Court's Test of Obviousness

It has long been recognized that every inventive act involves a twofold process, namely:

1. the conception of an idea by the inventor;
and,
2. the application of that idea to the production of a practical result.

"Neither of these elements is alone sufficient. An unapplied idea is not an invention. The application of an idea, not original with the person who applies it, is not an invention. Hence, the inventive act in reality consists of two acts; one mental, the conception of an idea, the other manual, the reduction of that idea to practice." I ROBINSON, THE LAW OF PATENTS FOR USEFUL INVENTIONS §77 (1890).

The Courts have recognized the twofold characteristic of invention and that patentable inventions may, in effect, reside in conception. In this regard, the Court's attention is here directed to the case of In re Hult, 162 F.2d 476, 74 USPQ 158 (C.C.P.A. 1947) wherein the Court of Customs and Patent Appeals commented:

"The rule has been so often stated, and is so well understood as to call for no citation of authorities that the assembling into a new article of a number of good features of the prior art may involve invention and be of such utility and produce such unexpected results as to be patentable. The conception of a structure of that character may be the invention, even though the assembly of it into a united structure would involve little more than mechanical skill after such invention." (Emphasis supplied.)

The underlined portion of the above quotation also makes it clear that the mere fact that an invention, once conceived, was readily reduced to practice does not render the invention unpatentable.

Attention is here also invited to the following decisions and comments of the Courts therein which recognize the significance of conception in the determination of patentable invention:

Zysset v. Popeil Brothers Inc., 276 F.2d 354, 124 USPQ 250 (C.A. 7, 1960) certiorari denied 364 U.S. 826, 127 USPQ 555

"A novel idea was incorporated. While it took mechanical skill to adapt the idea to practical use, and although the mechanics employed may have been obvious, the idea was not. It possessed the 'impalpable something which distinguishes an invention from simple mechanical skill'."

In re Fay and Fox, 347 F.2d 597, 146 USPQ 47,48 (C.C.P.A. 1965)

"Such a composition of matter is a new combination. It is necessary, therefore, to consider such a combination as an entity which embodies the invention for which a patent is sought. In other words, it is necessary to consider the invention 'as a whole', i.e., the mental conception of the invention as well as its embodiment in a particular composition of matter. 'A patentable invention is a mental result. *** The *** product is but its material reflex and embodiment.'

Smith v. Nichols, 88 U.S. (21 Wall.) 112 (1874)."

It is urged that the District Court failed to consider the Pickrell invention "as a whole" as required by 35 U.S.C. §103 in that it failed to test obviousness under the statute on the basis of both the conception of the idea involved and the application or reduction of this idea to practice. The District Court, rather, tested obviousness only on the latter condition. This is believed evident from the fact that the Court had before it no evidence showing or suggesting the conception of a V-shaped cofferdam, or a barge incorporating such a cofferdam, prior to the Pickrell invention; and that the Court laid great weight on its conclusion that "the plaintiff's witnesses practically conceded that there was nothing unusual or unique in the problems of engineering or construction presented by the Pickrell device." (C.T. 127-128). Appellant takes no issue with the District Court's conclusion regarding the problems of engineering or con-

struction presented by the Pickrell device, but it does dispute the validity of the District Court's judgment insofar as it failed to take into account and give proper weight to the conception of the Pickrell idea in determining the applicability of 35 U.S.C. §103.

3. The Significance of the Coast Guard Regulations

The District Court has found, in effect, that the Coast Guard Regulations, and particularly No. 32.60-10, dictated or rendered obvious the Pickrell invention set forth in the claims in suit (C.T. 129-130). This finding was based on the premise that, considering the state of the art, the existence of the Coast Guard Regulations requiring cofferdams between juxtaposed cargo holds to permit the vessel to carry dual cargoes of certain specified characteristics all but spelled out the Pickrell invention. The obvious shortcoming of this premise is that, while the prior art and Coast Guard Regulations may have indicated a problem, they did not teach Pickrell's solution to this problem.

In these respects, the situation in the case here under consideration parallels that in Twentier's Research v. Hollister, 319 F.2d 898, 138 USPQ 473 (C.A. 9). There the patent in suit related to an identification means for use on patients in hospitals and other institutions. The District Court in the Twentier's case made a finding (15) that a suitable identification means for such use is one which meets a criteria which was specified. The finding, however, included this observation:

"These criteria created the problem, not the solution."

In a further finding in the Twentier's case, quoted in the decision of the Court of Appeals, namely Finding No. 20, the District Court found that the identification means disclosed in the patent met the criteria it had set forth and solved the problem. Nevertheless, it held the patent valid and infringed. The Court of Appeals, in affirming, took note of the standard of invention recited in the controlling cases and observed:

"It is not a difficult task to discern the foregoing indicia of inventiveness in the present patent. What is the 'something' which the combination of all elements in this patent contributes to the art, and renders the 'whole' more than the 'sum of its parts'? It works. None of the prior devices did."

In refusing to apply the doctrine of the Twentier's case to the instant suit, the District Court commented as follows (C.T. 130-131):

"... Plaintiff's argument might have some merit if there was evidence or logic in its support. The overwhelming weight of credible evidence is to the effect that there is nothing unique, novel or extraordinary in the design of a V-shaped cofferdam. For that matter, the Court could well take judicial notice of that fact. Certainly the creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art."

From these comments it must be concluded that, in an effort to avoid the doctrine of the Twentier's case, the District Court has overlooked the very "evidence" which it proclaims was lacking in plaintiff's argument. Specifically, in concluding that there is nothing unique, novel or extraordinary in the design of a V-shaped cofferdam, the District Court has ignored its own concession succinctly set forth in the Opinion at C.T. 128 as follows:

"To be conceded, is the fact that the Pickrell cofferdam was unprecedented and was quickly imitated.---"

It is thus respectfully urged that the District Court has fallen prey to the same faulty reasoning pattern evidenced by the testimony of Appellee's experts at trial. Namely, once given the conception of providing a barge with a V-shaped cofferdam, it then appears impossible that the creation of the conception could have involved invention. Nevertheless, the weight of the credible evidence, by the total absence therefrom of any teaching or suggestion of the conception, points to the inescapable conclusion that the creation of the conception must, in fact, have been unobvious at the time the invention was made within the provisions of 35 U.S.C. §103.

4. The District Court's Characterization of Admiral Murphy's Testimony

Admiral Murphy's testimony, concerning a device that someone brought to the Coast Guard, related to a barge having a single W-shaped bulkhead separating adjacent cargo holds (DX 51-2). This device included no W- or V-shaped cofferdam and, thus, was no more similar to the invention of the Pickrell patent than the art of record before the Patent Office, such as U.S. Patent No. 754,107 to Wolvin (PX 6). The single nature of the W-shaped bulkhead disclosed in the device referred to in Admiral

Murphy's testimony is evident from observation of the sketch forming part of DX 51-2 and following comments found in the Coast Guard memorandum forming part of the exhibit:

"Accordingly, it is recommended that if the proposed design is formally submitted to the Coast Guard, it be approved only if a cofferdam is provided in the way of the deck depressions."

From this quotation it is clear that the device under consideration by the Coast Guard was lacking of a cofferdam similar to that of the Pickrell invention. Accordingly, the District Court's characterization of this testimony (C.T. 131) as indicating "that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention" was clearly in error, if it was intended to mean that this device was more similar to the Pickrell invention than the record art before the Patent Office in the prosecution of the Pickrell patent.

With respect to the preceding quotation from the Coast Guard memorandum, it is noted that no reference is made as to how a cofferdam might be provided "in the way of the deck depressions" or what shape such a cofferdam might have. Thus, the memorandum

can be given no more weight than the Coast Guard Regulations, since, although it points out the cofferdam requirement, it does not suggest the form of cofferdam embodied in the invention defined in the claims of the Pickrell patent in suit.

It is here noted that DX 51-2 must be treated as expert testimony, rather than prior art. This results because, by Admiral Murphy's testimony (R.T. 320), Coast Guard files of the nature of this exhibit are not available to anyone other than the man who submitted them.

5. The Presumption of Validity

The Pickrell patent in suit, No. 3,033,150, is, of course, presumed valid. The Statute (35 U.S.C. §282) so provides in this language:

"A patent shall be presumed valid. The burden of establishing invalidity of a patent shall rest on a party asserting it."

The characterization of the burden has not materially changed since it was declared with emphasis by Chief Justice Hughes, in Mumm v. Joseph Z. Dicker & Sons, 301 U.S. 168, 33

USPQ 247, as a heavy one. This language was employed:

"The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statutes have been met. Hence, the burden of proving want of novelty is upon him who avers it. Walker on Patents, Sec. 116. Not only is the burden to make good this defense upon the party setting it up, but his burden is a heavy one, as it has been held that 'every reasonable doubt should be resolved against him' Id., Cantrell v. Wallick, supra; Coffin v. Ogden, 18 Wall. 120, 124; The Barbed Wire Patent, 143 U.S. 274, 284, 285; Adamson v. Gilliland, 242 U.S. 350, 353."

This Court, even after the enactment of the Patent Act of 1952, followed the rule of the Mumm case, supra. In Patterson-Ballagh Corporation v. Moss, et al, supra, Judge Orr, speaking for the Court, had this to say:

"Appellants had the burden of proof on the question of the validity of the Moss Patent since a presumption of validity arises from the issuance of a patent. Mumm v. Jacob E. Decker & Sons, 301 U.S. 168, 171 (1937). Radio Corporation of America v. Radio Engineering Laboratories, Inc., 293 U.S. 1, 7 (1934). Reasonable doubts must be resolved in favor of the validity of the patent. The presumption created by the action of the Patent Office is the result of the expertness of an administrative body acting within its specific field and can be overcome only by clear and convincing proof. The District Court found that the appellants had not met this burden of proof. It did not err."

The District Court here has carefully compared the prior art considered by the Patent Office in the prosecution of the application which matured into the Pickrell patent with the teachings of the prior art devices which have been urged by Appellee at trial and has concluded (C.T. 123):

"I find that the submission of the teachings of these devices would not have materially added to the prior art which was actually considered by the Patent Office during the course of prosecution of the Pickrell Patent."

The Court, however, chose to overthrow the presumption of validity afforded the Pickrell patent under 35 U.S.C. §282 in its following treatment of the presumption (C.T. 131):

"Although, as previously mentioned, the prior art not considered by the Patent Office would have added nothing material to that which was considered, each article of that art, would have added something to the evidence in this proceeding that the Pickrell design was obvious."

Thus, while conceding that the art urged by the Appellant would not have added materially to that before the Patent Office, the District Court has overthrown the presumption of validity attaching to the Pickrell patent on the nebulous, and apparently inconsistent reasoning that this art added "something" indicating that the Pickrell design was obvious. It is respectfully submitted

that in so overthrowing the presumption of validity the Court has gone directly contrary to the dictates of 35 U.S.C. §282 and the established treatment of the presumption set forth in the Mumm and Patterson-Ballagh cases, supra, requiring that, in considering the presumption, "reasonable doubts must be resolved in favor of the validity of the patent."

6. Validity and Infringement

As previously mentioned herein at pages 11 to 14, the District Court's judgment of invalidity was based solely on an application of 35 U.S.C. §103 to the claims of the Pickrell patent in suit. In its application of Section 103 the Court, in effect, expressly overthrew the presumption of validity attaching to the claims under 35 U.S.C. §282. On the basis of the foregoing sections of this argument, it is respectfully submitted that the District Court erred in thus treating the patent; and that the claims of the patent here in suit are, in fact, valid.

If the claims in suit are valid, then there is no question that they are infringed by Appellee's accused devices. This has been spelled out by the District Court in its following finding at C.T. 132, as follows:

"If the Pickrell patent is declared valid, then I would have no hesitancy in holding that defendant's barges, built, converted and operated by defendant infringed Claims 1, 6, 8 and 11, of the patent in suit in the specifications as set forth in paragraph 2, subdivisions (a), (b), (c) and (d) on pages 8 and 9 of the pre-trial order; that the acts of infringement were knowingly, willfully and wantonly committed and that plaintiff would be entitled to injunctive relief against further infringements."

CONCLUSION

The District Court, in closing its Opinion, commented as follows (R.T. 132-133):

"Although adding no weight to my findings or conclusions, I must say that my sympathies are entirely with the plaintiff's position. It seems unfair that the patentee is not entitled to the benefit of putting together what might be termed a jigsaw puzzle and making it work. It would seem that he should be deserving of more than applause for a job well done."

It is respectfully submitted that the patentee is, indeed, deserving of more than applause and that, for the reasons set forth in the foregoing argument, the judgment should be re-

versed and the case should be remanded to the District Court for entry of judgment in favor of Appellant.

Respectfully submitted,

JOHN R. GILBERTSON
JAMES M. NAYLOR
JOHN K. UILKEMA
Counsel for Appellants

By *James M. Naylor*

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

James M. Naylor

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the foregoing APPELLANT'S OPENING BRIEF have this 6th day of September, 1966 been sent by first class air mail to Mr. John Gordon Gearin, 800 Pacific Building, Portland, Oregon 97207, the principal attorney for Appellee.

James M. Naylor

A P P E N D I X

I

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

(Duplicate Copy Follows)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RPTZ-PATCO, INC.,)	
)	
Appellant,)	
)	
v.)	NO. 21005
)	
PACIFIC INLAND NAVIGATION)	
COMPANY, INC.,)	
)	
Appellee.)	

APPELLANT'S STATEMENT OF
POINTS ON APPEAL

The following are the points on which Appellant,
RPTZ-PATCO, INC., intends to rely on this appeal:

1. The Trial Court erred in concluding that "the subject matter of Pickrell and the prior art, including the Coast Guard Regulations, was such that the subject matter as a whole would have been obvious at the time the invention [sic "was made"] to a person having ordinary skill in the art to which

said subject matter pertained."

2. The Trial Court erred in concluding that the "Pickrell device, when viewed in the light of the decision in Cuno, and the provisions of 35 U.S.C. §103, as interpreted in Graham v. John Deere Co., supra, does not, in the last analysis portray anything beyond the work of one who was merely skilled in his calling."

3. The Trial Court erred in concluding that the overwhelming weight of the expert testimony was that it would have been a fairly simple matter to modify the earlier devices or to combine features well known to the industry and long in use, and come up with a device following the Pickrell design.

4. The Trial Court erred in treating the Pickrell invention as residing in a cofferdam, per se, instead of the admittedly novel combination set forth in the claims in suit.

5. The Trial Court erred in applying a purely "hindsight" test of obviousness to the Pickrell invention.

6. The Trial Court erred in accepting and relying upon the "hindsight" testimony of Appellee's expert witnesses as a basis for a holding of invalidity of the Pickrell patent because of asserted obviousness under 35 U.S.C. §103.

7. The Trial Court erred in finding, in effect, that the Coast Guard Regulations, and particularly No. 32.60-10, dictated or rendered obvious the Pickrell invention set forth in the claims in suit.

8. The Trial Court erred in refusing to apply the doctrine of the decision of this Court in Twentier's Research, Inc. v. Hollister, Inc., 310 F(2d) 898 (1963), to the facts of this case and to hold that the Coast Guard Regulations "created the problem, but did not provide the solution".

9. The Trial Court erred in finding that "the overwhelming weight of the credible evidence is to the effect that there was nothing unique, novel or extraordinary in the design a V-shaped cofferdam" and that the Court could well take judicial notice that such was the fact.

10. The Trial Court erred in concluding that "the controlling reason for the inclusion of the V-shaped cofferdam in the Pickrell design was Coast Guard Regulation 32.60-10".

11. The Trial Court erred in concluding that "the creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art".

12. The Trial Court erred when it found that "Admiral Murphy's testimony indicates that someone brought a device similar to the Pickrell patent to the Coast Guard's attention in 1957, long prior to the Pickrell invention".

13. The Trial Court erred in finding that there was nothing in the actions of the Coast Guard, as related in the testimony of Admiral Murphy, at the time of the review of the design forming the subject matter thereof, that is in any way helpful to the plaintiff.

14. The Trial Court erred in finding, on the entire record, that the Pickrell device presented nothing which was not obvious in an architectural sense, nor did it demand new techniques of construction.

15. The Trial Court erred in finding and concluding that although the cofferdam was without precedent in the industry, the cofferdam's form and location were, in view of prior developments in the industry, all but spelled out for Pickrell by the Coast Guard Regulations.

16. The Trial Court erred in conceding that although the prior art considered by the Patent Office would have added nothing material to that which was considered, each item of the art would have nevertheless added something to the evidence in this proceeding that the Pickrell design was obvious.

17. The Trial Court erred when it concluded, from Pickrell's testimony, that "the Russell Barges and the Russell Patent made obvious every feature of his design, with the exception of the cofferdam".

18. The Trial Court erred in holding the claims in issue invalid when it tested obviousness under 35 U.S.C. §103 on the basis of the engineering problems which would be involved in constructing the claimed structure rather than, correctly, on the basis of the obviousness of conceiving the claimed combination.

19. The Trial Court erred in failing to give Appellant the full value of the presumption of validity of the Pickrell

patent and in failing to recognize that Appellee had not sustained its burden of proof.

20. The Trial Court erred in finding the Pickrell patent invalid.

JOHN R. GILBERTSON
JAS. M. NAYLOR
JOHN K. UILKEMA

By *J. K. Uilkema*
Attorneys for Appellant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing APPELLANT'S STATEMENT OF POINTS ON APPEAL has been served upon Appellee by mailing copies thereof to its attorney, John Gordon Gearin, Esquire, 800 Pacific Building, Portland, Oregon 97207, this 21st day of July, 1966.

J. K. Uilkema
JOHN K. UILKEMA

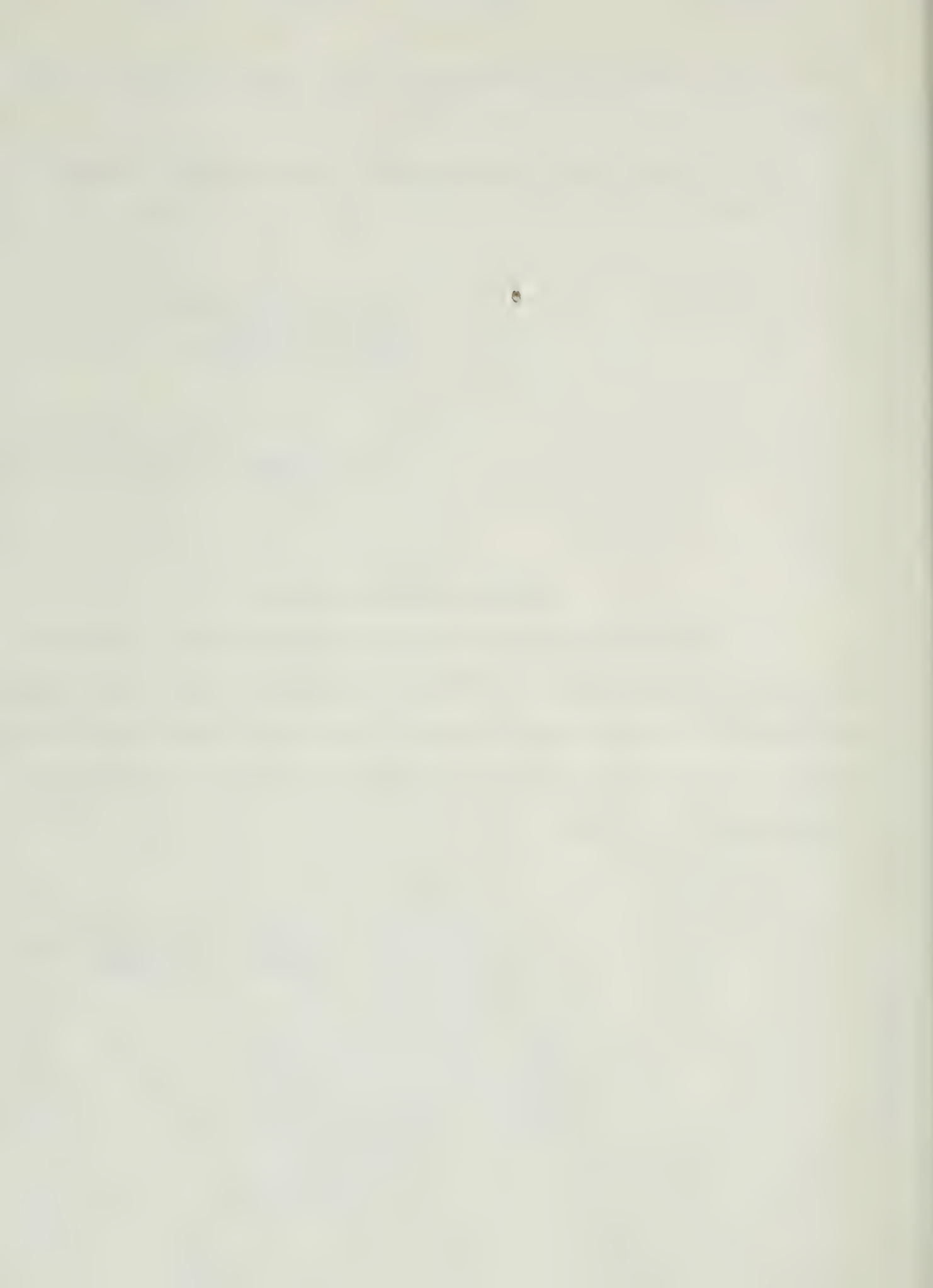


TABLE OF EXHIBITSPLAINTIFF'S EXHIBITS

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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PLAINTIFF'S EXHIBITS (Continued)

<u>K NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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PLAINTIFF'S EXHIBITS (Continued)

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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	R.T. 438	438	438	

Although this Exhibit was identified as "Rules and Regulations" in the Clerk's record of Exhibits, it is not clear from the Reporter's Transcript where it was offered and received.

DEFENDANT'S EXHIBITS

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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A	R.T. 283-284	283	284	

From the Reporter's Transcript, it is not clear where these Exhibits were received.

DEFENDANT'S EXHIBITS (Continued)

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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A-4H	*3	*3	*3	
A-4I	*3	*3	*3	
A-4J	*3	*3	*3	
A-4K	*3	*3	*3	
A-4L	*3	*3	*3	

DEFENDANT'S EXHIBITS (Continued)

<u>NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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	Pretrial Order	419	419	
5A	R.T. 419	419	419	
5B	R.T. 419	419	419	

From the Reporter's Transcript the exact identity of these Exhibits and where they were offered and received is not clear. It appears that these Exhibits form part of the Exhibits in the Deposition of Lew Russell Sr. identified in the Pretrial Order as Defendant's Exhibit 47.

Although this Exhibit was identified as "Rules and Regulations" in the Clerk's record of Exhibits, it is not clear from the Reporter's Transcript where it was offered and received

DEFENDANT'S EXHIBITS (Continued)

<u>EXHIBIT NO</u>	<u>IDENTIFIED</u>	<u>OFFERED</u> (Nos. Refer to R.T.)	<u>RECEIVED</u> (Nos. Refer to R.T.)	<u>REJECTED</u> (Nos. Refer to R.T.)
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5	Pretrial Order	419	419	
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5	Pretrial Order	420	420	
5A	R.T. 420	420	420	
5B	R.T. 420	420	420	
5C	R.T. 420	420	420	
5D	R.T. 420	420	420	
5	Pretrial Order	417	417	
5	Pretrial Order	421	421	
5	Pretrial Order			
	R.T. 102	103	103	
	R.T. 278-279	279	279	
	Pretrial Order	*4	*4	

From the Reporter's Transcript, it is not clear where these Exhibits were offered and received.

No. 21105

In the

**United States Court of Appeals
For the Ninth Circuit**

RPTZ-PATCO, INC.,
*Appellant and
Cross-Appellee,*

v.

PACIFIC INLAND NAVIGATION COMPANY, INC.,
*Appellee and
Cross-Appellant.*

APPELLEE'S BRIEF

Appeal from the United States District Court
for the District of Oregon

HON. JOHN F. KILKENNY, Judge

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NOV 7 1966

WM. B. LUCK, CLERK

FEB 15 1967

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No. 21105

In the

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RPTZ-PATCO, INC.,
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APPELLEE'S BRIEF

STATEMENT OF JURISDICTION

Appellee accepts appellant's statement of jurisdiction
(Br 2).¹

STATEMENT OF THE CASE

The case involves alleged infringement of U.S. Pickrell patent No. 3,033,150 by Pacific involving, specifically, three combination petroleum and dry cargo barges operated on the Columbia River and its tributaries. The appeal involves only the question of validity of the said patent. 35 USC § 103

1. As hereinafter used, references to Appellant's Brief are indicated by "Br"; references to the Clerk's Transcript of the Record are indicated by "C.T."; references to the Reporter's Transcript are indicated by "R.T."; and references to Plaintiff's and Defendant's exhibits are indicated by "PX" and "DX", respectively.

“§ 103. *Conditions for patentability; non-obvious subject matter*

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made. July 19, 1952, c. 950, § 1, 66 Stat. 798.”

The patent relates to steel barges for carrying combination dry cargo in an upper V-shaped cargo space and petroleum products such as gasoline in tanks below the V-shaped dry cargo space. The two cargoes in the patent are separated by a continuous V-shaped cofferdam. A cofferdam is a double wall with a void space between.

For the Court's convenience, claim 11 is quoted as a typical claim:

“11. A cargo vessel having plural cargo holds in superposed relation, comprising a hull with a deck thereover, sides and a bottom, an elongated cofferdam extending transversely of said hull and along a substantial portion of the length thereof separating said cargo holds from each other, said cofferdam comprising imperforate upper and lower plating elements defining a non-cargo chamber between them, said cofferdam being generally of V-shaped conformation in transverse section, having sloping

sides converging toward each other adjacent the bottom of the hull and diverging to points adjacent the joinder of the deck with both sides of the hull, said cofferdam having access means opening into the non-cargo chamber therein from the area above the deck to permit inspection of said non-cargo chamber independent of the loading of either or both of said holds."

The trial court found as a fact the combination claimed was obvious in accordance with the language of Section 103.

In order for the Court to understand the appellee's position, certain historical facts are important. Multiple cargo vessels (including, of course, barges) were not new nor were vessels where the two cargo compartments were separated by a void space or cofferdam.

In 1934 L. S. Baier, a shipbuilder, with the assistance of one Lew Russell, Jr., designed a welded tank barge, the UMATILLA (R. T. 406). It was specifically designed for use on the Columbia River for carrying oil and grain, the grain being carried in a house above, the petroleum products below in the lower hold of the barge (R. T. 407). The barge was built and placed into operation by Shaver-Tidewater Company (R.T. 408).² The grain house of the UMATILLA and the lower petroleum hold

2. The relationship of Shaver-Tidewater Company to PATCO and the relationship of other barge operators to Shaver-Tidewater and PATCO will be subsequently discussed.

were separated by a cofferdam. There was in this barge a sump area for the collection of wheat in order to facilitate its unloading (R.T. 407). Manholes were constructed to provide access to the cofferdam which were accessible and visible throughout (R.T. 409). In other words, the voids were accessible and vented. The cofferdam was designed and built pursuant to regulations of the Bureau of Marine Inspection³ requiring a cofferdam between the petroleum tanks and a dry cargo. The reason why a V-shaped wheat or grain container with a cofferdam—the principal claim of the patent in suit—was not designed at that time (1934) was a practical one as the existing channel of the Columbia River was of insufficient depth to permit a deeper draft barge (R.T. 412). Although contemplated the multiple dam system for the Columbia River with its attendant locks had not then been constructed.

The UMATILLA was equipped with fluid-tight bulkheads dividing the liquid cargo space into a series of compartments. The cofferdam had transverse bulkheads co-extensive with the bulkheads of the liquid cargo carrying spaces. The transverse bulkheads fore and aft extended completely across the barge (R.T. 412-413). There were screw conveyor troughs in the dry cargo compartment.

3. At this time the Coast Guard had not yet assumed the duties of the United States Bureau of Marine Inspection.

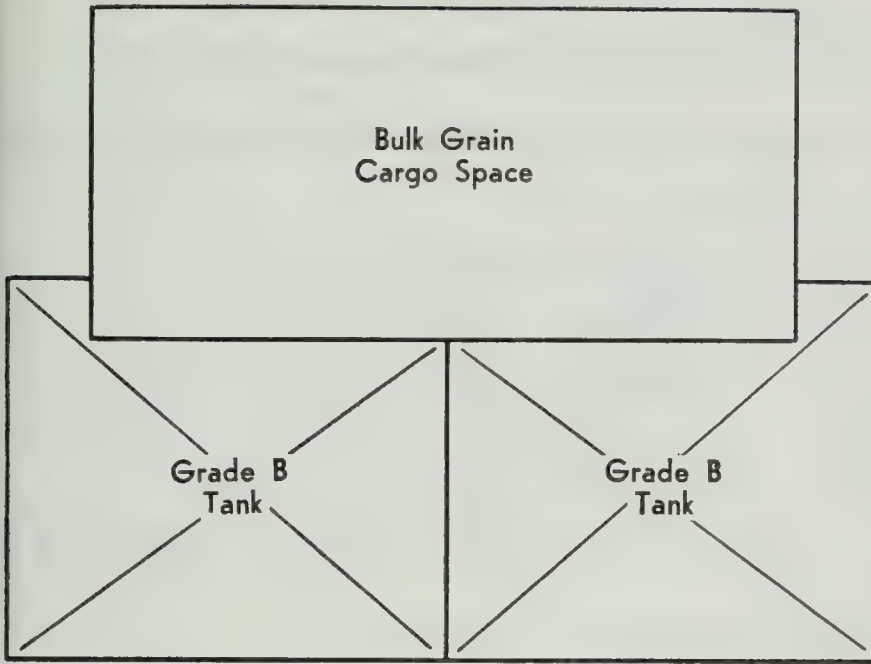
Significantly, the cofferdam in the original UMATILLA drawings was not of sufficient height to meet the Bureau's requirements. The original drawing for the barge UMATILLA with the legend "Additional Cofferdam Arrangement" is DX 53-1.

Following the UMATILLA, Inland Navigation Company, one of Pacific's predecessors, in 1941 and 1942 submitted for approval certain plans for the conversion of its Barge 503 to a dual capacity steel barge for use on the Columbia River (Deposition of Captain Emery H. Joyce, Officer in Charge of Marine Inspection, United States Coast Guard, DX 51). Drawings showing the proposed alteration (DX 51-B and 51-C) to a combination petroleum and dry cargo barge included a V-shaped wheat sump in the hull which was intended to carry petroleum. The proposal was not approved by the Bureau because there was no cofferdam between the deckhouse and the tanks and between the wheat sump and the tanks (R.T. 401).

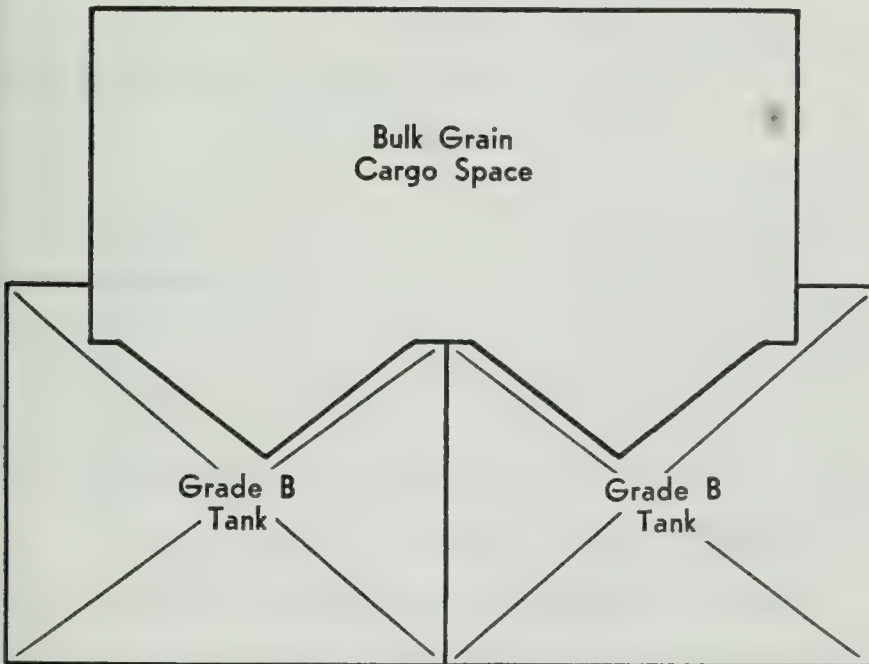
Inventor Pickrell quite candidly testified that the alleged novel feature of his patent is in the shape of the cofferdam (R.T. 108). However, for many years prior to the alleged invention the Coast Guard and its predecessor, the Bureau, had by statutory regulation required a void space between adjoining cargo compartments where such compartment contained Grades A,

B, C or D liquid petroleum products of a low flash point such as gasoline (46 C.F.R. 30.10-13, 32.55-45, 32.60-10, 32.65-15). The inventor knew of these regulations before he conceived his patent (R.T. 109-110) (so found by the trial court (C.T. 130)). No witness testified that any particular engineering or construction problems existed in either designing or constructing the void space. In fact, PATCO takes no issue with the Court's finding in this regard (Br 35-36).

In 1957, more than one year prior to the filing date of the instant patent application, the United States Coast Guard in conjunction with the American Petroleum Institute again took the position that in a combination barge a cofferdam was required to separate the V-shaped grain compartment and the petroleum tanks (Admiral Charles P. Murphy, Chief of the Office of Merchant Marine Safety, Coast Guard Headquarters, DX 76, DX 51-2). Sketches of the submitted 1957 proposal to the Coast Guard are reproduced on the page following.



Sketch 1



Sketch 2

The prior art which appellant concedes is “pertinent to the invention of the Pickrell patent” (Br 8, 9) is:

I. The gravity unloading dry cargo hold art, typified by:

Barge R-76 (DX 37-2, -3, -4)

Barge R-27 (DX 66 and 67)

Barge R-21 (DX 66 and 67)

Patent 2,889,942 (DX 58)

Patent 1,803,105 (PX 6)

Drawings for the “Sinclair-Petrolore” (DX 2)

II. The cofferdam art, typified by:

Barge “Umatilla” (DX 53)

Patent 2,594,930 (PX 6)

The United States Coast Guard Regulations
for Tank Vessels (PX 25)

Barge R-76 (DX 37-2, 37-3, 37-4) was capable of carrying dual cargo, namely, grain and liquid ammonia (R.T. 425). It was also capable of carrying Grade E petroleum products (R.T. 426). It had a V-shaped grain hopper which ran continuously along the major length of the barges.

Barge R-21 (DX 66) was adapted to carry grain in a V-shaped hopper and liquid ammonia in the tanks. All that would have been required for Barge R-21 to

carry petroleum products would have been the strengthening of the tanks (inventor's testimony, R.T. 122).

The Hudson patent 2,594,930 (DX 9) disclosed a dual cargo vessel adapted to carry bulk products and liquid products such as petroleum, although not limited thereto. The Hudson patent discusses in detail the problems of a dual cargo barge and the inventor's solution. It accomplishes substantially everything that Pickrell (the instant inventor) claims is his contribution except that it does not have a continuous cargo space extending substantially the entire length of the vessel. This feature, however, is not Pickrell's contribution as it is clearly disclosed in Barges R-76 and R-21. (The McElheny patent 695,758 (DX 14) (for some reason not listed by appellant), Russell patent 2,889,942 (DX 58)) There is nothing in the Pickrell claims relating to the continuous V-shaped grain hopper open at the top through substantially the length of the barge for ease of unloading (R.T. 458). Cofferdam structures at each end of a barge are found in Henry patent 2,896,416 (DX 23) and in the SINCLAIR PETROLORE (DX 2).

CHALLENGED FINDINGS OF THE DISTRICT COURT AND APPELLEE'S DESIGNATION OF RECORD REFERENCE SUPPORTING SUCH FINDINGS

The entire thrust of this appeal deals with challenged findings relating to the issue of "obviousness."

For brevity the 16 challenged findings are reproduced in Appendix A. The trial court's opinion (C.T. 132) stated that the agreed facts and the opinion would serve as the court's findings.

While characterizing certain findings as conclusions, appellant ignores the fact that what it now must challenge are findings of fact. The pretrial order (C.T. 108) specified that the following issue of fact, among others, were submitted to the court for determination:

- 1) Is the Pickrell patent valid?

Specific record references to the evidence supporting the findings are as follows:

R.T.	Exhibits
89	DX 2
97	DX 9
106-108	DX 14
109-110	DX 23
122	DX 37-2, -3, -4
242	DX 51
287	DX 51A-D
309	DX 51-2
362-364	DX 53-1
367-369	DX 58
371	DX 66
401	DX 67
406	DX 76

407 PX 1

408

409

412

413

415

425

426

432

437

440

458

467

472

474

475

491-492

496

498

SUMMARY OF ARGUMENT

A) Obviousness

All the witnesses who testified on the subject, the printed exhibits, prior art and United States Coast Guard regulations supported if not compelled the District Court's finding that the differences between the subject matter sought to be patented and the prior art

are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which the subject matter pertains, 35 USC § 103.

B) Prior Art

Both prior barges of which the inventor and those in concert with him had knowledge, and prior patents support if not compel the finding of no valid invention.

C) Presumption of Validity

The presumption of validity may in a proper case, as it was in this case, be largely dissipated. The District Court's findings were more than adequately supported by the evidence. The District Court did not "overthrow" the presumption but gave it the weight to which it was entitled.

D) Additional Grounds for Affirming the Finding of Invalidity

The inventor, PATCO and those in concert with him did not disclose to the patent office pertinent prior art of which he had direct knowledge and obtained the patent by inequitable conduct.

ARGUMENT

A) Obviousness — 35 USC § 103

PATCO and those actively interested in it, including

Lew Russell, Jr., referred to supra, the interests of the Russell Family, Shaver-Tidewater Barge Lines, Tidewater Barge Lines, North Shore Boat Building, Albany Barge Lines, all located in the Portland-Vancouver area, are under one guise or another direct competitors of Pacific. As early as the barge UMATILLA (1934) when Lew Russell, Jr. assisted Baier in the design of the combination wheat-petroleum barge for the Columbia River, Russell and the interests of his family, who are stockholders of the plaintiff corporation, together with other family interests, knew of the pertinent prior art in the form of the earlier barges actually designed, built for, owned and operated by this group. These barges were the UMATILLA, Barge R-21, R-27 and R-76, and Russell patent 2,889,942 (DX 58) shows the construction of one of the Russell family barges. Mr. Russell assisted in the preparation of the instant patent. His wife is financing the instant litigation (R.T. 496).

The statutory test in determining whether the patent was valid is 35 USC §§ 102 and 103. In this appeal only § 103 is involved. The District Court found it was not.

“Findings of fact shall not be set aside unless clearly erroneous * * *.” (Rule 52 FRCP)

It would be improper, based upon an examination of the patent alone, to have it upheld because to do so

would enjoin Pacific from operating its barges on the Columbia River and its tributaries in interstate commerce as the patent is not an advancement in the arts and sciences for which the constitutional provisions for patent protection were intended to provide. The public interest, protection of the public and the system of free enterprise are paramount considerations over and above personal interests of patent owners or patentees.

The commerce and industry of a large portion of the northwestern United States should not be deleteriously affected by this or any other patent on such an obvious construction which falls into the category referred to by the Supreme Court in a number of cases as being the result of the patent office granting patents on non-meritorious inventions.

When patent claims are drawn to a mere combination of two or more well-known elements, the combination is unpatentable unless the combination produces in some way or manner a surprising or unusual result which would not have been expected by a person having ordinary skill in the art.

Great A. & P. Tea Co. v. Supermarket Equip. Corp.,
(1951) 340 US 147, 71 S Ct 127, 95 L Ed 162.

Oriental Foods v. Chun King Sales, (CA 9 1957) 244
F2d 909.

Graham v. John Deere Co., (1966) 383 US 1, 86 S Ct
684, 14 L Ed 2d 545.

Sinclair & Carroll Co. v. Interchemical Corp., (1945)

325 US 327, 65 S Ct 1143, 89 L Ed 1644, held:

“A long line of cases has held it to be an essential requirement for the validity of a patent that the subject-matter display ‘invention,’ ‘more ingenuity . . . than the work of a mechanic skilled in the art.’ [citing cases] This test is often difficult to apply; but its purpose is clear. Under this test, some substantial innovation is necessary, an innovation for which society is truly indebted to the efforts of the patentee. Whether or not those efforts are of a special kind does not concern us. The primary purpose of our patent system is not reward of the individual but the advancement of the arts and sciences. Its inducement is directed to disclosure of advances in knowledge which will be beneficial to society; it is not a certificate of merit, but an incentive to disclosure. See *Hartford Empire Co. v. United States*, decided Jan. 8, 1945, 323 US 386, 431, ante, 322, 371, 65 S Ct 373. * * *” (325 US at 330-331)

Mercoïd Corp. v. Mid-Continent Invest. Co., (1944)

320 US 661, 64 S Ct 268, 88 L Ed 376, held:

“The grant of a patent is the grant of a special privilege ‘to promote the Progress of Science and useful Arts.’ Const. Art. I, § 8. It carries, of course, a right to be free from competition in the practice of the invention. But the limits of the patent are narrowly and strictly confined to the precise terms of the grant. [citing cases] It is the public interest which is dominant in the patent system. [citing cases] It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of it is invalid [citing cases] and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not

plainly within the terms of the grant. The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly." (320 US at 665-666)

No genuine issue existed but that the differences between what Pickrell sought to patent and the prior art would have been obvious at the time of the claimed invention to any person having ordinary skill in the art. (§103)

Supporting this bold statement, reference is made to the testimony of all the witnesses who testified on the subject.

Leighton A. Johnson, Chief Engineer for Gunderson Bros. Engineering Corporation, testified (R.T. 426):

"Q Now, Mr. Johnson, before 1958 if you were called upon to convert that barge as shown in Barge 76, Exhibits 37-3 and 37-4, to a combination grain and liquid cargo barge carrying gasoline, what would you have done?

A We would have had to make provision for a cofferdam to comply with the Coast Guard.

Q Where would you have put the cofferdams?

A It would have had to have separated the grain compartment from the bottom tanks.

Q And will you tell us whether or not it would have required any special knowledge or skill on your part to design, build and install those cofferdams?

MR. GILBERTSON: Your Honor, I object to that as quite leading.

THE COURT: It would be an opinion. He may answer.

THE WITNESS: Would you read that back?

(Last question read.)

THE WITNESS: No."

Jess E. Carson, Naval Architect employed by Willamette Iron and Steel Company, testified (R.T. 432):

"Q I am going to ask you if as of, say, 1957, you were called upon in your capacity as a naval architect to design a combination grain and gasoline barge involving a V-shaped hopper for the grain compartment, how would you do it?

A Put a cofferdam below the grain hopper to seal off — to isolate the two compartments.

Q Where would you carry the gasoline?

A In the lower compartment.

Q. As someone in the field of naval architecture, do you have an opinion as to the amount of skill required to design or build or convert such a vessel?

A Any good naval architect would be very capable of doing it."

On cross-examination Mr. Carson stated that in his opinion he did not consider the cofferdam in question a patentable article (R.T. 437).

Robert A. Smith, Consulting Naval Architect to Albina Engine and Machine Works, testified (R.T. 440):

“Q If, say, prior to the year 1958 you were called upon to design a combination grain and gasoline cargo barge employing a V-shaped hopper, with which you have expressed some familiarity, how would you do that? How would you go about it and what would you do?

A Well, where the dry cargo space or the separation between the two spaces extends below the main deck, the rules of the U. S. Coast Guard would require that they be separated by a cofferdam .

Q In what shape would you have designed that cofferdam?

A Well, since the bottom of the grain compartment was V-shaped, it would be logical to be as economical as possible of space and to allow as much space as possible for the oil compartment, making it a V shape, just paralleling the grain structure.”

In addition to these witnesses, Philip F. Spaulding, a professional Naval architect, expressed surprise that a patent had been granted on a barge with a V-shaped cofferdam (R.T. 371), an item “basically so fundamental.” Mr. Spaulding further testified that it would have been obvious to him how to construct a cofferdam to separate the grain and the petroleum products, and provide a V-shaped cofferdam if a V-shaped wheat hopper was used, and further no problems existed that a person skilled in the shipbuilding art could not readily solve, as one undoubtedly would be necessary (R.T. 367-9).

The only patent expert who testified was Mr. George Newitt, produced by Pacific, who also testified in his opinion that the Pickrell patent was invalid in view of Section 103 (R.T. 491-2).

Pickrell, the patentee, admitted that the only difference in his patent over the prior art was a V-shaped cofferdam rather than a V-shaped single plate hopper (R.T. 106-8), and the Court so found. Mr. Pickrell admitted that what he did was merely take the flat, horizontal, traditional double bottom protection area of a barge and bend it up to conform to the shape of the V-shaped wheat compartment (R.T. 89).

PATCO's only witness on the subject of obviousness, Lawrence C. Norgaard, a practicing Naval architect, admitted (R.T. 242):

“Q Would you have any difficulty, as a man skilled in the shipbuilding field, in making a cofferdam, making a single-wall construction into a cofferdam by adding another wall and making it a void space?

A He might.

Q Any more than would be within the ordinary skill of such a person?

A No.”

Aside from the testimony of all witnesses on the issue of obviousness and quite aside from the prior art

introduced by Pacific, which will be discussed presently, the Coast Guard records in themselves demonstrate the obviousness of Pickrell's design.

In 1934 L. S. Baier, who was designing a barge for Shaver-Tidewater in conjunction with Lew Russell, Jr., was required by the Bureau to enlarge the cofferdam already provided in his drawings in the combination grain and petroleum barge UMATILLA. Later in 1941 Inland Navigation Company submitted plans to the Bureau for conversion of a combination grain and petroleum barge. The contemplated barge had a V-shaped wheat sump. The wheat was to be carried above and the petroleum products below. These plans were not approved and the barge was not built as the Bureau insisted upon a cofferdam between the grain compartment sump and the petroleum tanks (R.T. 287, 401).

In 1957 the Coast Guard in conjunction with the American Petroleum Institute again took the position that a V-shaped grain compartment had to be separated from the petroleum tanks of a combination barge by a cofferdam (R.T. 309).

In summary, with respect to the question of invalidity of the claims in issue of the Pickrell patent, all witnesses called by both parties agreed that what Pickrell patented would be obvious to one skilled in the art. Therefore, on the broad question of law, that is, the

applicability of Section 103 and without the necessity of the application of any further prior art, the Pickrell claims in issue are invalid. The Court's findings of invalidity should be upheld.

As noted by the District Court (C.T. 127-128) (which had full opportunity to judge the credibility of the witnesses) if the Pickrell device of a V-shaped cofferdam involved unique or unusual problems of engineering or construction, which it solved, experts would have been called to so testify. No one did.

B) Prior Art

Although no single piece of prior art, including publications or prior public uses, disclosed a V-shaped cofferdam in a dual cargo vessel, to modify single pieces of prior art, such as the UMATILLA (DX 53-1) or the Hudson patent (DX 9), would be obvious without the combining of other prior art references. As a matter of law, prior art references may be and are combined by the patent office and courts in many instances in order to reject, anticipate or invalidate claims on the basis that it would not require any more than ordinary skill to combine them.

For example, in the case of *Canadian Ingersoll-Rand Co. v. Peterson Prod. of San Mateo*, (DC ND Cal 1963) 223 F Supp 803, modified on other grounds 350 F2d 18, the court stated:

“The combining of two or more references for the purpose of showing obviousness is not only allowable but quite common. *Griffith Rubber Mills v. Hoffar*, 313 F.2d 1, 5 (9th Cir. 1963).” (223 F Supp at 812)

Canadian Ingersoll-Rand is authority for many of Pacific’s contentions with respect to obviousness. For example, the District Court quoted *Griffith Rubber Mills v. Hoffar*, (CA 9 1963) 313 F2d 1, which should be the controlling law.

“It follows that though a device may be new and useful it is not patentable if it consists of no more than a combination of ideas which are drawn from the existing fund of public knowledge, and which produces results that would be expected by one skilled in the art. A public grant of the private power to exclude others from making, using, and selling such a device simply ‘withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men.’ No balancing public benefit results from such a patent since the fund of freely available public knowledge is reduced during the period of monopoly, and is only restored rather than enhanced when that period ends.

* * * * *

“Although no single one of the elements of the total prior knowledge embraced the whole of Hoffar’s muffler, we think the difference between their sum and Hoffar’s combination of them was unsubstantial and that his advance must be held to have been an obvious one to a person skilled in this art.

“There was no objective evidence that the combination was less obvious than it appears. There was

no showing that Hoffar's muffler dealt with a problem which had concerned the industry over a substantial period and which others had sought to solve without success. *So far as was shown, Hoffar was the first to make an all-elastomer muffler with a slit-baffle wall only because he was the first skilled in the art who directed his attention to the problem of creating an effective muffler that would not corrode.*" (313 F2d at 3-6; emphasis added)

Although Pickrell may have been the first to make a V-shaped cofferdam for combination grain and Grades A, B, C and D petroleum product barge for use on the deepened Columbia River, he could have been the first one in this area to direct his attention to the problem of building such a barge after sufficient water was available (although the 1957 submission to the Coast Guard belies even this statement).

The barge UMATILLA, which concededly was in operation on the Columbia River and its tributaries long prior to the conception of the Pickrell patent, was a combination petroleum and grain barge which carried diesel oil and grain and also gasoline and grain. The grain was carried in an upper cargo space with the petroleum products in lower tanks (R.T. 407). The upper cargo space and the lower tanks were separated by a horizontal cofferdam (R.T. 409). The cofferdam as originally designed by L. S. Baier for PATCO's predecessor was

modified in order to increase the height of the cofferdam because the Coast Guard required it so that access could be obtained thereto (R.T. 415). Such access was obtained by the provision of manhole covers at the ends of the coffer (R.T. 409).

Mr. Baier testified that the reason the UMATILLA was not designed with a V-shaped wheat cargo space with a cofferdam was because of the controlling depths of the water in the Columbia River (R. T. 412).

All river people since that time—1934—have been looking forward to the development of bigger barges as soon as the dams were installed in the Columbia River (Pickrell, R.T. 97).

Both Spaulding (R. T. 368) and Newitt (R.T. 472, 474, 475) testified that, in their opinion, it would not involve invention to bend the cofferdam of the UMATILLA downwardly at the center to provide a V-shaped cofferdam if a V-shaped grain hopper was desired. Therefore, it is reiterated that without combining any reference with the UMATILLA it is a complete anticipation of the claims of the Pickrell patent in issue. The mere addition of transverse fore and aft bulkheads or a cofferdammed wheat sump in some of the claims do not lend patentability to them if the broad concept of the V-shaped cofferdam was obvious, as it was.

The prior art Barge R-76 was delivered on Decem-

ber 23, 1957 (R.T. 425). It was capable of carrying dual cargo, namely, grain and liquid ammonia (R.T. 425). It was also capable of carrying Grade E petroleum products according to Johnson's testimony (R.T. 426). It had a V-shaped grain hopper which ran continuously along the major length of the barge. Since it was delivered approximately December 23, 1957, it is a statutory bar with respect to the Pickrell patent which was filed more than one year thereafter, namely, on April 6, 1959.

It would not involve invention to combine the teachings of the barges UMATILLA and R-76 (R.T. 474). Either the UMATILLA could be modified without invention by making the wheat hopper a V-shape, or the R-76 could be modified if it was desired to carry Grades A, B, C or D petroleum products by making a V-shaped cofferdam in view of the UMATILLA. Smith testified at R.T. 440, referring to the obviousness of the V-shaped cofferdam:

"Q In what shape would you have designed that cofferdam?

A Well, since the bottom of the grain compartment was V-shaped, it would be logical to be as economical as possible of space and to allow as much space as possible for the oil compartment, making it a V shape, just paralleling the grain structure."

As we have already noted, PATCO concedes that there were no engineering or construction problems pre-

sented by the Pickrell device (Br 35-6). The claims in issue of the Pickrell patent were anticipated by the combination of the prior uses of the barges UMATILLA and R-76.

The same thing is true of the combination of the UMATILLA and the Barge R-21 (R.T. 475), a Russell Family barge which was delivered to Tidewater Barge Lines on July 3, 1957 (R.T. 498). This, when delivered on July 3, 1957, was adapted to carry grain in a V-shaped hopper and liquid ammonia (DX 66 and 67). All that would have been required on Barge R-21 to carry petroleum products would have been strengthening of the tanks (Pickrell, R.T. 122).

It is also possible to combine the teachings of the barge UMATILLA with the Russell patent (DX 58), which also shows a continuous V-shaped single plate hopper for the grain compartment (R.T. 475).

The Hudson patent (No. 2,594,930, DX 9) was cited by the Examiner but was not used to reject the claims but was referred to merely as "Pertinent Art" as distinguished from "References Applied" (R.T. 467). It was not used by the Examiner to reject claims on the cofferdam feature, although another patent the Examiner cited, namely, Henry 2, 896,416, DX 23, did show transverse cofferdams.

The Hudson patent discloses a dual cargo barge

which is adapted to carry bulk products and liquid products, such as petroleum, although not limited thereto. The Hudson patent discusses the problems of a dual cargo barge and Hudson's solution, the same problems and solutions referred to in Pickrell's patent specifications (PX 1). It accomplishes functionally everything that Pickrell accomplishes except it does not have a continuous cargo space extending substantially the length of the barge. However, this feature is obviously not Pickrell's invention, being clearly disclosed in Barges R-76, R-21, Russell patent and in McElheny patent 695,758, DX 14. It is to be noted that there is nothing in the Pickrell claims relating to the continuous V-shaped grain hopper open at the top throughout substantially the length of the barge for ease of unloading (R.T. 458).

It would be obvious to bend the vertical or U-shaped cofferdam of Hudson inwardly to form a V-shaped grain cargo space if it was desired to do that for quick unloading without combining Hudson with any other references (R.T. 368).

Also, Hudson may be combined with the prior art R-76 or R-21 barges or with the Russell patent, DX 58, without involving invention. All of these references disclose a continuously open V-shaped grain cargo hopper (R.T. 474).

Cofferdamming the grain collection pit which is referred to in claim 6 would not require invention in view of the requirements for a cofferdam to separate the collection pit space and the liquid cargo space (R.T. 475) and would be obvious as necessary, particularly in view of the Coast Guard correspondence in 1942 in which the Coast Guard advised Pacific's predecessor that a cofferdam would be required for a grain collection pit if Grades A, B, C or D petroleum products were to be carried in the barge, which was then being considered for modification (Joyce deposition, DX 51, DX 51A-D).

The addition of cofferdam structures at each end of the barge, referred to in claim 8, would not be obvious in view of Henry 2,896,416, DX 23, or the SINCLAIR PETROLORE shown in "Marine Engineering Log" for April 1956, pages 96 and 97, DX 2 (R.T. 362-4).

In summary, therefore, the claims in issue are invalid in view of the UMATILLA taken alone, the Hudson patent taken alone, or either of these references which combine readily with the Russell Family barges referred to or the Russell patent.

(1) The entire oral testimony, (2) the Coast Guard records or (3) the prior art establish the obviousness of what is claimed to have been an invention. PATCO's cry of hindsight is not substantiated because, first, no one so testified and, secondly, all the witnesses who gave

opinion testimony on obviousness related their opinion to 1958 and 1957 and earlier, long before the statutory one year period immediately preceding the filing date of the original patent application.

There was no long-felt need incapable of fulfillment as presented to this Court in *Twentier's Research, Inc. v. Hollister Incorporated*, (CA 9 1963) 319 F2d 898. Both Tidewater's and Pacific's predecessors knew exactly what to do and how to do it. What they were both waiting for was the completion of the earlier projected plans for deepening the Columbia River by the recent series of dams. A clearly known unpatentable combination cannot be made patentable by commercial success or the existence of a long-felt need if indeed one existed in the matter of the combination barges. *Bentley v. Sunset House Distributing Corp.*, (CA 9 1966) 359 F2d 140.

The District Court's ruling of obviousness was not solely based upon the uncontradicted oral testimony but upon the clear mandate of *Graham v. John Deere Co.*, (1966) 383 US 1, 86 S Ct 684, 15 L Ed 2d 545. As this Court held in *Bentley*, following *Graham*:

"In assessing the patentability of combination patents, we are to apply a 'severe test,' whether 'the whole in some way exceeds the sum of its parts' to produce 'unusual or surprising consequences from the unification of the elements * * *,' *Great A. & P. Tea Co. v. Supermarket Equipment Co.*, 1950, 340 U.S. 147, at 152, 71 S.Ct. 127, at 130, 95 L.Ed. 162. But that unification here produces only the obvious.

Meat molds had previously been produced, the only unusual feature in this combination is its vents. Vents had been used for similar purposes in other food molds, and their use in this meatball mold is no more ingenious than would be expected of 'a person having ordinary skill in the art,' 35 U.S.C. § 103. We do not regard this combination to be less obvious than many which we have previously held unpatentable, [citing cases]." (359 F2d at 144)

C) Presumption of Validity

PATCO's criticism of the Court's finding in view of the asserted "presumption of validity" (Br 41) is unfounded for this Court has recently held in *Bentley*:

"* * * Nor does the presumption of validity created by the action of the Patent Office. That presumption in any case 'has been in recent years almost reduced to nullity in patent cases.' [citing cases] * * *" (359 F2d at 146)

The District Court, as did this Court in *Bentley*, properly interpreted *Graham*:

" '[U]nless more ingenuity and skill . . . were required than were possessed by an ordinary mechanic acquainted with the business, there was an absence of that degree of skill and ingenuity which constitute essential elements of every invention. In other words, the improvement is the work of a skilled mechanic, not that of the inventor.' At p. 267, 13 L ed at p. 691." (15 L Ed 2d at 553)

Not only has this Circuit in *Bentley*, supra, but the Eighth Circuit in *Kell-Dot Industries, Inc. v. Graves*, (CA 8 1966) 361 F2d 25, and the Fifth Circuit in *Zero Manufacturing Co. v. Mississippi Milk Pro. Ass'n*, (CA 5 1966) 358 F2d 853, so held.⁴ Appellant's contentions are effectually refuted in another Eighth Circuit case (following *Graham*): *American Infra-Red Radiant Co., Inc. et al v. Lambert Industries Inc., et al*, (CA 8 1966) 360 F2d 977, which disposes of all issues in this appeal.

Bentley pointed out that where the patent office had not considered pertinent prior art now before the Court, as is true in the present case, the presumption of validity is largely dissipated and cited earlier Ninth Circuit cases to this effect. The presumption of validity is seriously weakened where the patent office has not considered pertinent prior art. See *Zero Manufacturing Co. v. Mississippi Milk Pro. Ass'n*, supra. The fact that one may be the first skilled in the art who actually produced the art is not tantamount to a patented invention.

While criticizing the District Court for not considering the Pickrell patent "as a whole", PATCO overlooks the fact that the District Court did correctly apply the statutory Section 103 criteria.

"Defendant argues that the subject matter of Pickrell and the prior art, including the Coast Guard Regulations was such that the subject matter as a

4. Petitions for certiorari have been filed in *Kell-Dot* and *Zero*.

whole would have been obvious at the time the invention, to a person having ordinary skill in the art to which said subject matter pertained. I agree.” (C.T. 123)

Yet PATCO “takes no issue with the District Court’s conclusion regarding the problems of engineering or construction presented by the Pickrell device * * *.” (Br 35-6)

Twentier’s Research, Inc. v. Hollister Incorporated, supra, upon which PATCO relies, is not in point because there the problem of patient identification in hospitals had existed for many years. A number of solutions had been tried and disregarded, and a fact finding board for hospitals had been established which had rejected all other identification devices and found that the patented device was the only satisfactory device where none of the prior devices did. That situation does not exist here since there were no other dual cargo vessels on the Columbia River which had been tried and rejected. Here there was no problem to be solved nor long felt need to be fulfilled. When the water carriers were able to make larger barges with greater draft to carry dry cargo and Grades A, B, C and D petroleum products, the way to do it was obvious. The way to accomplish this was suggested in 1934, 1941, 1942 and 1957. All that remained was a deeper draft in the Columbia River.

D) Additional Grounds for Affirming the Finding of Invalidity

Lew Russell, Jr., the Russell Family interests and Tidewater Barge Lines knew of the pertinent prior art in the form of earlier barges actually designed, built for, owned and operated by this group. These were not brought to the attention of the patent office during the prosecution of the Pickrell patent. These barges were the UMATILLA, Tidewater Shaver Barges R-21, R-27, R-76, Russell patent 2,889,942 (DX 58). Nor were the Coast Guard Regulations requiring a cofferdam (R.T. 110).

While it is true that there was no absolute requirement that pertinent prior art be brought to the Examiner's attention when he does not know of his own knowledge or it is not in publication, there is a strong moral responsibility to advise the patent office of such prior art, particularly when those interested in the patent are in direct economic competition with others operating barges on the Columbia River. If the patent office had been informed of this prior art or had the applicability of the Coast Guard regulations been discussed with the Examiner, the chances are that no patent would ever have been issued to Pickrell.

The equity in this case between PATCO and those in alliance with it, being Pacific's competitors on the Co-

lumbia River, demonstrate inequitable procurement of the patent and the necessary removal of the patent granted by reason thereof.

Here PATCO and those in concert with it obtained the patent without a full, above-board disclosure of prior art known to those who attempt to collect damages from and to enjoin Pacific from operating its barges on the river. In *Walker Process Equip. v. Food Mach. Chem. Corp.*, (1965) 382 US 172, 86 S Ct 347, 15 L Ed 2d 247⁵ it is said:

“* * * At the same time, we have recognized that an injured party may attack the misuse of patent rights. See, e.g., *Mercoind Co. v. Mid-Continent Investment Co.*, 320 US 661, 88 L ed 376, 64 S Ct 268 (1944). To permit recovery of treble damages for the fraudulent procurement of the patent coupled with violations of § 2 accords with these long recognized procedures. It would also promote the purposes so well expressed in *Precision Instruments*, supra, 324 US at 816, 89 L ed at 1387.

“‘A patent by its very nature is affected with a public interest . . . [I]t is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from back-grounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope.’” (15 L Ed 2d at 251)

⁵ ~~Cartier v. British Rema Co. has recently been denied in the Walker Process case.~~

Actually Pacific has been put to great expense and trouble in defending a suit involving a patent which should never have been issued. "Misuse" is clearly involved which renders the Pickrell patent unenforceable.

The lower court in its opinion stated that "my sympathies are entirely with the plaintiff's position." (C.T. 132) In the light of this statement it must be concluded that the District Court was extremely careful and meticulous in making its findings that the claims of the patent in suit were invalid because the subject matter was obvious and therefore did not meet the requirements of Section 103 of the patent statutes.

CONCLUSION

All the evidence, written and oral, independent of or considered with the prior art and federal regulations, support the findings of obviousness.

John Gordon Gearin
W. Melville Van Siver
ATTORNEYS FOR APPELLEE





No. 21105

In the

**United States Court of Appeals
For the Ninth Circuit**

RPTZ-PATCO, INC.,
*Appellant and
Cross-Appellee,*

v.

PACIFIC INLAND NAVIGATION COMPANY, INC.,
*Appellee and
Cross-Appellant.*

BRIEF ON CROSS-APPEAL

Appeal from the United States District Court
for the District of Oregon

HON. JOHN F. KILKENNY, Judge

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BRIEF ON CROSS-APPEAL

STATEMENT OF JURISDICTION

This is an appeal from so much of the decree entered in the United States District Court for the District of Oregon on April 19, 1966, as holds (Pretrial Order, paragraph VI, subparagraph 3), that if claims 1, 6, 8 and 11 of the Pickrell patent in suit No. 3,033,150 are subsequently declared valid, the accused barges of the defendant infringed said claims and that such infringement was knowingly, wilfully and wantonly committed.

The jurisdiction of the District Court was admitted by the parties in the Pretrial Order, Section III, Paragraph I (C.T. 98) and was conferred upon the Court by 35 USC § 281 and 28 USC § 1338(a). A timely notice of cross-appeal having been filed (C.T. 142), this Court has jurisdiction of the cross-appeal by virtue of 28 USC §§ 1291 and 1294.

STATEMENT OF THE CASE

RPTZ-PATCO, Inc., hereinafter referred to as PATCO, as owner of Pickrell patent No. 3,033,150, filed a suit against Pacific Inland Navigation Company, hereinafter referred to as Pacific, for alleged infringement of the patent, seeking an adjudication of the validity of the patent, an injunction against further infringement, damages and attorney's fees. PATCO designated

claims 1, 6, 8 and 11 as those which were to be relied upon in the District Court to support its contentions.

A pretrial order which superseded the pleadings was agreed upon by the parties and approved by the Court (C.T. 97).

By said pretrial order, the following issues of fact (among others) were submitted to the Court:

1) Is the Pickrell patent valid?

2) If the Pickrell patent is valid, has defendant infringed it? (C.T. 108)

The Court's opinion on March 31, 1966 (C.T. 118) stated that the agreed facts and the opinion would serve as the Court's findings (C.T. 132). The Court specifically held that the patent was invalid but further found that in the event the patent were subsequently declared valid, Pacific's barges infringed claims 1, 6, 8 and 11 of the patent in suit and that the acts of infringement were knowingly, wilfully and wantonly committed (C.T. 132).

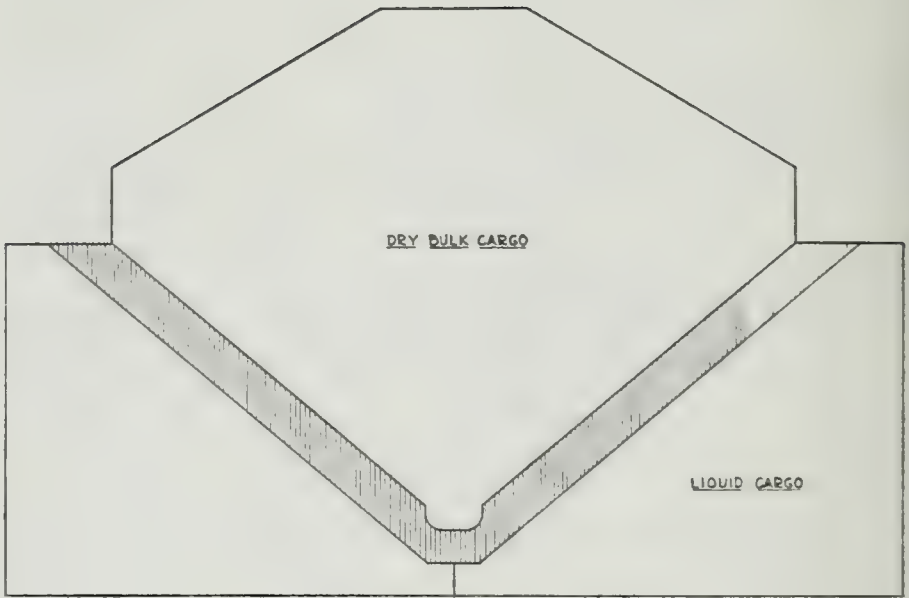
Thereafter a decree of dismissal was filed on April 19, 1966 (C.T. 134).

Thereafter and on May 18, 1966, Pacific filed its notice of appeal from the trial court's ruling of infringement (C.T. 142).

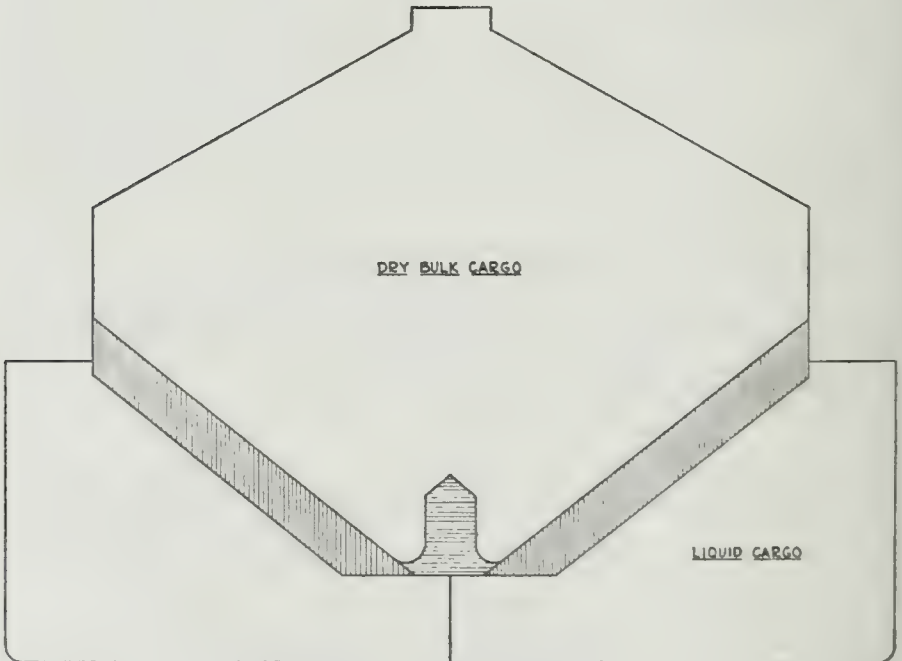
The historical and factual background of this litigation is contained in appellee's statement of the case in its answering brief, *supra*, pages 1-9, and is incorporated herein by reference.

The construction of Pacific's barges is disclosed in the enlarged reproduction of its drawing (PX 9 A-D) demonstrating that Pacific's barges have four separate cofferdams therein which are not continuous and which are not V-shaped but which are W-shaped (R.T. 357-8). There are two sloping cofferdams extending from adjacent to the deck line to near the bottom of the barge. There is a third centerline cofferdam extending the length of the barge which is connected to but not continuous with the two sloping cofferdams (R.T. 361). There is a fourth cofferdam around the grain pit which is not connected to the three other cofferdams (R.T. 358).

Pacific's resultant construction resulted in a W-shaped discontinuous cofferdam. See reproduction of DX 75 on the following page.



PICKRELL PATENT



PACIFIC INLAND BARGE

Claim 1 of the patent reads as follows:

“1. A cargo vessel for handling multiple types of cargo comprising a hull having a deck line, sides and a bottom, and an elongated cofferdam structure of substantially greater width than thickness mounted within the hull and arranged longitudinally therein, said cofferdam structure extending substantially continuously between the sides of the hull and having lateral portions that start at the sides and approximately the deck line of the hull and that slope from both sides of the hull downwardly and inwardly, said lateral portions joining at approximately the longitudinal centerline of the hull thereby to define for the cofferdam structure a substantially V-shaped cross-sectional outline, said cofferdam structure having a bottom surfacing which, together with the sides and bottom of the hull, defines cargo space adapted to carry liquid cargo, said cofferdam structure having a top surfacing defining the bottom of a self-clearing cargo space for dry cargo of substantially triangular cross section, the top and bottom surfacing being separated by a void within the cofferdam structure, said lateral portions of said cofferdam structure having means at approximately the deck line of the hull providing for entry into said cofferdam structure.”

It is noted that claim 1 calls for “an elongated cofferdam structure” which defines a single cofferdam and not a plurality of cofferdams, as in Pacific’s barges.

The claim also states that the lateral cofferdam portions slope from both sides of the hull downwardly and inwardly and are joined at approximately the longitudinal centerline of the hull to define a substantially

V-shaped cross-sectional outline. In Pacific's barges the lateral portions are not joined and are not joined at the longitudinal centerline of the hull. Furthermore, in Pacific's barges the cofferdams do not define a substantially V-shaped cross-sectional outline but define a W-shaped cross-sectional outline.

Claim 6 is the same as claim 1 with the addition of the grain collection pit.

Claim 8 is substantially the same as claim 1 except it does not state that the two sides are joined, but since it is limited to a single cofferdam structure of V-shape the two sides would have to be joined to correspond to this language.

Claim 11 is quite similar to claim 8.

With respect to file wrapper estoppel Mr. Newitt pointed out (R.T. 449-51) that Pickrell cancelled original claims 1 and 2 after rejection by the patent office, claim 2 being cancelled after the first office action (R.T. 450-1) and claim 1 being cancelled after amendment due to rejection in the first office action after the second office action (R.T. 449-51).

Original claim 1 reads as follows:

"1. A cargo vessel comprising a hull having sides and a bottom, and means within the interior of the hull defining an elongated cargo space for dry cargo, the latter means comprising a cofferdam structure

having opposed side portions, one on each side of the hull, each side portion extending downwardly into the hull and sloping inwardly from the side of the hull, said cofferdam structure having a continuous top surfacing defining the bottom of the cargo space for dry cargo and a continuous bottom surfacing which, together with the bottom and sides of the hull, defines a second cargo space adapted to carry liquid cargo, said top and bottom surfacing being separated by a void.” (DX 29)

Mr. Newitt also pointed out that statements were made on behalf of the patentee by his attorney that the interior of the cofferdam is substantially completely accessible by a workman and that with a horizontal cofferdam this would not be possible (R.T. 453). Mr. Newitt testified at R.T. 453-456 as follows:

“At this point I would like to point out that Claim 1 was still in the case; in other words, all of the claims that were being discussed here were not limited to the V-shaped cofferdam in which the legs of the V are joined together.

Now, after the Examiner rejected his Claim 1 as amended — and this was done on Page 51, your Honor — the Examiner says:

‘Claims 1 and 3 are rejected as being unpatentable over any one of Wolvin, Fletcher, Odenbach, or Maier, each in view of Henry.’

He said:

‘Each of the basic references discloses a ship with a cargo hold having inclined walls and spaces at the sides of the ship which can contain liquids. Henry discloses cofferdam structure 30

between holds in a ship as well as double wall hull construction. To make the inclined walls of the basic references of a cofferdam construction to afford access to the interior of the walls is deemed a non-inventive mechanical expedient in view of the teachings of Henry, since it is not apparent that any new or unobvious results would be obtained thereby.'

And then in response to that rejection the applicant argued, quite vigorously, with respect to the accessibility of this void space, and points out how important it is to be able to view the interior of this cofferdam from either side.

I call your attention to Page 58:

'There is the further consideration that not only has applicant conceived of cofferdam structure with a concave side defining a cargo space and a convex side defining the upper limits of a space below it, but further, and very important, applicant has conceived of such a concave cofferdam structure where at any given time by inspection along the sides of the structure the interior of the cofferdam throughout may be completely inspected even though such cofferdam in effect extends under the cargo as well as along its sides.'

And this portion beginning at 'where at any given time by inspection along the sides' has been underlined by the attorney who wrote this.

Then at Line 16:

'Added to the fact that a concave cofferdam is contemplated, therefore, is the conception of a shape which enables visual inspection of the entire interior without having to go down inside the cofferdam, even though such cofferdam has the concavity or convexity desired.'

Then he says:

'The ideas discussed above, do, in applican't [sic] opinion, bring about a new, unexpected and different type of result. The interior of the cofferdam is always easily inspected, even though the cofferdam extends under as well as down the sides of the dry cargo space which extends uninterruptedly down the length of the vessel. In this connection, merely showing V-shaped walls in a hold is not considered pertinent, since such V-shape has not been selected with any view towards providing visibility, which is a basic concept of the present invention.'

There are many, many remarks of this kind in the file wrapper. I will just point to one more.

The last word on the bottom of that Page 58:

'... but where at the same time there is visibility of bottom interior portions of the cofferdam by visual inspection from its sides.' "

One of the features of the Pickrell construction which was stressed by Pickrell was that one could gas-free the cofferdam of the Pickrell patent by placing a suction on one side thereof (R.T. 61-2).

SPECIFICATIONS OF ERROR

I

The District Court erred in finding that Pacific's barges infringed claims 1, 6, 8 and 11 of the Pickrell patent No. 3,033,150 because (a) the accused barges differ structurally and functionally from the claim in

issue, and (b) there was no infringement by the accused barges because of the defense of file wrapper estoppel.

II

The District Court erred in finding that the acts of infringement were knowingly, wilfully and wantonly committed.

SUMMARY OF ARGUMENT

A) Non-infringement

The accused barges differ structurally and functionally from the claims in issue. The patent specifications and drawings call for a continuous V-shaped cofferdam—the accused barges have not one but four which are not V but W-shaped; a system for visibility and accessibility of the entire cofferdam structure, and gas-freeing ability of the entire space, none of which are possible in the accused barges.

B) File Wrapper Estoppel

Broader claims were conceived by the inventor and the patent, therefore, cannot now be broadened to cover that which was abandoned.

C) Wilful Infringement

There could be no evidence of oppressive or fraudulent conduct when experienced Naval architects ex-

pressed surprise that the Pickrell device was patentable, particularly in view of its obviousness.

ARGUMENT

A) Non-infringement

Even without relying upon the clear file wrapper estoppel present in this case, the claims in issue are not infringed when read in the light of the specifications and drawings of the Pickrell patent.

DX 75 illustrates in simplified form the cross-section of a barge in accordance with the subject patent and the cross-section of the accused barges and demonstrates non-infringement. As pointed out in the statement of the case and as illustrated in simplified form in the drawing DX 75, Pacific's barges have four separate cofferdams which are not continuous and which are not V-shaped but which are W-shaped (R.T. 357-8), no different than the 1957 proposal to the Coast Guard. The resultant construction results in a discontinuous cofferdam.

The Pickrell patent specification states that an automatic loading system may be employed but has no other reference to this feature except that the cargo bin is self-clearing (R.T. 458). The patent is silent with respect to allegations made at the trial by PATCO's witnesses that the additional cofferdam plate adds strength

to the vessel (R.T. 457-8), and Pacific's expert, Spaulding, testified that it would add very little strength to the construction (R.T. 335). The Pickrell patent at column 4, lines 70-75, stresses that the void between the wall structure 140 and the inner walls of the pit 130 connects with the voids of the portions of the V-shaped cofferdam directly adjacent thereto which enables visual inspection of the interior of the void surrounding the grain pit from points within the cofferdam. This is impossible in Pacific's barges (R.T. 360).

Great stress is laid in the Pickrell patent as to accessibility of the entire interior of the cofferdam completely to the bottom of the vessel. This is not possible or true of Pacific's accused barges since accessibility to each cofferdam is separate and it is impossible to either see from one cofferdam to another or to gain access from one cofferdam to another (R.T. 358-60).

Another point stressed at the trial by PATCO's witnesses was that it would be possible to gas-free the entire space of the cofferdam by placing a suction device on one side of the vessel only (R.T. 61). Pacific's experts testified that this could not be done in Pacific's accused barges since the four cofferdams are completely sealed off from each other and provision must be made and is made to gas-free each of them separately. (R.T. 358).

Claim 1 has been reproduced in the statement of the

case, and it is noted that the claim includes the limitations that the cofferdam structure is of substantially V-shaped cross-sectional outline and also is limited to a single cofferdam structure extending substantially continuously between the sides of the hull. As pointed out above, the Pacific barges do not have a V-shaped cofferdam but rather have a W-shaped cofferdam and do not have a single continuous cofferdam extending from one side of the vessel completely to the other side across the bottom as shown in DX 75 in the sketch entitled "Pickrell patent."

A structural element of a claim or its substantial equivalent must be found in the accused device in order to establish infringement, and the fact that the accused device performs the same function and achieves the same result as the patented device does not in and of itself establish infringement. *Lockwood v. Langendorf United Bakeries, Inc.*, (CA 9 1963) 324 F2d 82. The fact that two devices accomplish the same result or perform the same function settles nothing about infringement. *Air Device v. Air Factors*, (CA 9 1954) 210 F2d 481. Pacific's barges accused to infringe omit elements claimed in claim 1, and no equivalent structures are present therein. In such a case, unless the element recited in the claim is present or its equivalent is found, there is no infringement. *Simons v. Davidson Brick Co.*, (CCA 9 1939) 106 F2d 518.

Claim 6 is the same as claim 1 without addition of a grain collection pit recited therein and, therefore, is not infringed by Pacific's barges (R.T. 461).

Claim 8 is substantially the same as claim 1 except that it does not state that the two sides are joined but is limited to a single cofferdam structure of V shape so that the two sides would necessarily have to be joined without interruption to correspond to this language. Since Pacific's barges are not so joined and do not divide a V shape, this claim is not infringed (R.T. 461-2).

Claim 11 is quite similar to claim 8 and does not infringe for the same reasons as set forth with respect to claims 1 and 8 (R.T. 463-4).

Summarizing, it is apparent that none of the claims alleged to be infringed by Pacific's barges are in fact infringed. The law on this subject is succinctly stated in *Pratt and Whitney Company v. United States*, (Ct Cl 1965) 345 F2d 838:

“* * * Courts have long held that a claim is not ‘like a nose of wax, which may be turned and twisted in any direction’ to make it include something not expressly recited. [citing cases] * * *” (345 F2d at 846-7)

The District Court has found that everything contained in the claims of the Pickrell patent was old except

the shape of the cofferdam, and under these circumstances it is obvious that Pickrell cannot be classified as a "pioneer patent." It is merely a very slight improvement patent in a crowded field, as shown by both the prior patents and by the barge constructions.

B) File Wrapper Estoppel

The doctrine of file wrapper estoppel may be divided into two categories: (1) the estoppel is based upon the cancellation of broader claims in response to a rejection by the patent office, or (2) the reasons given for the allowance of claims by the applicant or his attorney may cause the claims to be limited to these features.

With respect to the first category, the rule is stated in *I. T. S. Rubber Co. v. Essex Rubber Co.*, (1926) 272 US 429, 47 S Ct 136, 71 L Ed 335:

"It is well settled that where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he cannot after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. * * *" (272 US at 443)

See also *Oregon Saw Chain Corp. v. McCulloch Motors Corp.*, (CA 9 1963) 323 F2d 758.

It will be apparent from a mere reading of claims 1 and 2 as originally presented that they are not limited to V-shaped cofferdam structure and are not limited to cofferdam structure which is joined adjacent the bottom centerline of the hull. Therefore, when these claims were cancelled, the subject matter thereof which would have read on Pacific's accused barges cannot now be recaptured, and the claims alleged to infringe which have these limitations referred to therein cannot be broadened to cover that which was abandoned. Therefore, since the remaining claims alleged to be infringed are necessarily limited there is no infringement by Pacific's barges.

With respect to the second category of file wrapper estoppel, the theory is that the actions taken by applicant or his attorney and the remarks made to overcome rejections by the patent office are part of the negotiations for the contract which becomes effective between the patentee and the public when the patent issues. This category of file wrapper estoppel is referred to in *Moon v. Cabot Shops, Inc.*, (CA 9 1959) 270 F2d 539.

“* * * Claims of a patent must be construed not only in the light of the specifications and drawings but also with reference to the file wrapper history. * * *” (270 F2d at 543)

Mr. Newitt testified (R.T. 452-6) as to the many points which were stressed in the arguments in the file wrapper on behalf of Pickrell. He pointed out the great stress which was laid upon the ability in the Pickrell construction to visually inspect all portions of the cofferdam from either side, including the bottom, both in the arguments and in the specification of Pickrell (R.T. 454-6). This feature is not found in Pacific's accused barges.

Mr. Newitt also pointed out that statements were made on behalf of the patentee by his attorney that the interior of the cofferdam is substantially completely accessible by a workman and that with a horizontal cofferdam this would not be possible (R.T. 453). This is also not possible in Pacific's accused barges. Mr. Newitt testified (R.T. 453-6) as follows:

“At this point I would like to point out that Claim 1 was still in the case; in other words, all of the claims that were being discussed here were not limited to the V-shaped cofferdam in which the legs of the V are joined together.

Now, after the Examiner rejected his Claim 1 as amended—and this was done on Page 51, your Honor—the Examiner says:

‘Claims 1 and 3 are rejected as being unpatentable over any one of Wolvin, Fletcher, Odenbach, or Maier, each in view of Henry.’

He said:

‘Each of the basic references discloses a ship with a cargo hold having inclined walls and spaces at the sides of the ship which can contain liquids. Henry discloses cofferdam structure 30 between holds in a ship as well as double wall hull construction. To make the inclined walls of the basic references of a cofferdam construction to afford access to the interior of the walls is deemed a non-inventive mechanical expedient in view of the teachings of Henry, since it is not apparent that any new or unobvious results would be obtained thereby.’

And then in response to that rejection the applicant argued, quite vigorously, with respect to the accessibility of this void space, and points out how important it is to be able to view the interior of this cofferdam from either side.

I call your attention to Page 58:

‘There is the further consideration that not only has applicant conceived of cofferdam structure with a concave side defining a cargo space and a convex side defining the upper limits of a space below it, but further, and very important, applicant has conceived of such a concave cofferdam structure where at any given time by inspection along the sides of the structure the interior of the cofferdam throughout may be completely inspected even though such cofferdam in effect extends under the cargo as well as along its sides.’

And this portion beginning at ‘where at any given time by inspection along the sides’ has been underlined by the attorney who wrote this.

Then at Line 16:

‘Added to the fact that a concave cofferdam is contemplated, therefore, is the conception of a shape which enables visual inspection of the

entire interior without having to go down inside the cofferdam, even though such cofferdam has the concavity or convexity desired.'

Then he says:

'The ideas discused above do, in applican't [sic] opinion, bring about a new, unexpected and different type of result. The interior of the cofferdam is always easily inspected, even though the cofferdam extends under as well as down the sides of the dry cargo space which extends uninterruptedly down the length of the vessel. In this connection, merely showing V-shaped walls in a hold is not considered pertinent, since such V-shape has not been selected with any view towards providing visibility, which is a basic concept of the present invention.'

There are many, many remarks of this kind in the file wrapper. I will just point to one more.

The last word on the bottom of that Page 58: '... but where at the same time there is visibility of bottom interior portions of the cofferdam by visual inspection from its sides.'

That, your Honor, is what I depend upon when I say that the void within the cofferdam must be continuous and uninterrupted so as to provide this visibility and accessibility about which so much is made in this argument."

One of the features of the Pickrell construction which was stressed by Pickrell was that you could gas-free the cofferdam of the Pickrell patent by placing a suction on one side thereof (R.T. 61-2). This is impos-

sible in the multiple cofferdam structure of Pacific's accused barges.

Therefore, based on the second category of file wrapper estoppel, the claims of the Pickrell patent in issue are not infringed by Pacific's accused barges.

One who has abandoned and withdrawn another application as a condition of getting a patent in suit is estopped from contending from any construction of claims which would in effect secure the matters abandoned. *Bacon American Corp. v. Super Mold Corp. of Cal.*, (DC ND Cal 1964) 229 F Supp 998. The abandonment of a claim has the same legal effect as abandoning an "application."

The District Court ignored the defense of file wrapper estoppel and ignored the uncontroverted testimony regarding this defense.

C) Wilful Infringement

The issue date of the Pickrell patent was May 8, 1962. Larry Glosten, a Naval architect, received instructions from Pacific to design barges for use on the Columbia River to carry grain and petroleum. This assignment was early in 1962 (R.T. 255). The detailed drawings which Mr. Glosten prepared are dated as early as May 25, 1962, only 17 days after the issuance of the Pickrell patent. These drawings are DX 98 et seq. (R.T. 225). On their face it is apparent that it would have been impos-

sible for a Naval architect to have determined the design and construction which the barges were to have and to complete such an elaborate drawing as drawing 6207-1 (PX 9-A) in 17 days. There is nothing in the record to show that Mr. Glosten or Pacific knew of the pendency of the Pickrell patent at any time prior to its date of issue, and the evidence in the record shows that the first time that Pacific was aware of the Pickrell patent was when it received notice of claimed infringement thereof following receipt of the March 15, 1963 letter to it from PATCO's then attorneys (PX 2).

That Mr. Glosten, an independent Naval architect who maintained his own office and was not an employee of Pacific, had occasion to view the barges which turned out to be the subject matter of the Pickrell patent or had occasion to view but not copy the plans therefor cannot constitute evidence that Pacific was guilty of knowingly, wilfully or wantonly committing any acts of infringement. The record is barren of any evidence even suggesting infringement of this nature.

We have previously called the Court's attention to the testimony of Mr. Jess Carson, Naval architect, that the cofferdam in question was not a patentable article, the like testimony of Mr. Spaulding who expressed surprise that a patent was issued, and the testimony of Mr. Newitt, giving his opinion of invalidity.

“* * * Patentees generally entertain suspicion that those who challenge their claims are deliberate malefactors. However bona fide, such suspicions produce no legal effect, unless sustained by evidence substantiating suspicion as truth.” *Enterprise Mfg. Co. v. Shakespeare Co.*, (CA 6 1944) 141 F2d 916 at 920-1.)

There can be no wilful, malicious or deliberate infringement if there is a mistake as to the reasonably debatable question of validity.

The sincere genuine doubts as to the validity of the patent have been corroborated by the inventor for he testified (indicating his lack of confidence in the validity of the patent):

“Q And your deal with Lew Russell is that after you find out if the patent is any good then you will work out a royalty?

A That is correct.” (R.T. 91-2)

Moreover, the District Court found that the patent was invalid. This finding by the District Court demonstrates that any questioning by Pacific of the validity of the patent was not specious. There was no evidence of a wilful infringement or concealment—Pacific acted in good faith. See *Technograph Printed Circuits, Ltd. v. Bendix Aviation Corp.*, (DC Md 1963) 218 F Supp 1.

The prior art, the Coast Guard regulations and the earlier barges furnish a reasonable basis for a good faith belief that Pacific was entitled to build its presently accused structures without fear of infringing any valid patent which might issue. Moreover competent Naval architects expressed surprise that the Pickrell device was patentable.

The test is whether there has been oppressive or fraudulent conduct. *Laskowitz v. Marie Designer, Inc.*, (DC SD Cal 1954) 119 F Supp 541. It would seem incongruous indeed for Pacific's construction to be labeled wilful, malicious and deliberate when it proceeded in good faith to build the barge when the District Court found that there was no invention to infringe. There can be no infringement of an invalid patent, and this Court has so stated on many occasions.

CONCLUSION

The evidence fails to disclose any infringement, much less infringement of a wilful or malicious intent.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of the foregoing brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney

APPENDIX A

CHALLENGED FINDINGS OF THE DISTRICT COURT

1. “ ‘the subject matter of Pickrell and the prior art, including the Coast Guard Regulations was such that the subject matter as a whole would have been obvious at the time the invention [sic. “was made”] to a person having ordinary skill in the art to which said subject matter pertained.’ (C.T. 123)”

2. “The ‘Pickrell device, when viewed in the light of the decision in *Cuno*, and the provisions of 35 U.S.C. §103, as interpreted in *Graham v. Deere Co.*, supra, does not, in the last analysis, portray anything beyond the work of one merely skilled in his calling.’ (C.T. 127)”

3. “ ‘The creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art.’ (C.T. 130-131)”

4. “ ‘the Russell Barges and the Russell patent made obvious every feature of his design, with the exception of the cofferdam.’ (C.T. 132)”

5. “Surely, if the Pickrell device of a V-shaped cofferdam involved unique or unusual problems of engineering or construction, which were solved only by the Pickrell technique, experts would have been called to so testify. Not only, is the record completely silent on such

a claim, but the plaintiff's witnesses practically conceded that there was nothing unusual or unique in the problems of engineering or construction presented by the Pickrell device." (C.T. 127-128)

6. "the overwhelming weight of expert testimony is that it would have been a fairly simple matter to modify the earlier devices or to combine features well known in the industry and long in use, and come up with a device following the Pickrell design (C.T. 128)"

7. "the overwhelming weight of credible evidence is to the effect that there was nothing unique, novel or extraordinary in the design of a V-shaped cofferdam and that the Court could well take judicial notice that such was the fact (C.T. 130)"

8. "... on the entire record that the Pickrell device presented nothing that was not obvious in an architectural sense, nor did it demand new techniques of construction." (C.T. 131)."

9. "On this record, the Pickrell cofferdam has not been independently nor directly demonstrated. What could make the cofferdam more obvious than a law which required its construction? The Coast Guard Regulations have the force and effect of law." (C.T. 128)

10. "the controlling reason for the inclusion of the V-shaped cofferdam in the Pickrell design was Coast Guard Regulations 32.60-10" (C.T. 130)"

11. “although the cofferdam was without precedent in the industry, the cofferdam’s form and location were, in view of prior developments in the industry, all but spelled out for Pickrell by the Coast Guard Regulations (C.T. 131).”

12. “To overcome the effect of this regulation, the plaintiff cites *Twentier’s Research, Inc. v. Hollister, Inc.*, supra, and argues that the regulations created the problem, but did not provide the solution. Plaintiff’s argument might have merit if there was evidence or logic in its support. The overwhelming weight of the credible evidence is to the effect that there was nothing unique, novel, or extraordinary in the design of a V-shaped cofferdam. For that matter, the court could well take judicial notice of that fact. Certainly, the creation of such a V-shaped design would not require more ingenuity than that possessed of a mechanic skilled in the art.” (C.T. 130-131)

13. “‘Admiral Murphy’s testimony indicates that someone brought a device similar to the Pickrell patent to the Coast Guard’s attention in 1957, long prior to the Pickrell invention.’ (C.T. 131)”.

14. “‘there was nothing in the actions of the Coast Guard at the time of the review of this design that is in any way helpful to the plaintiff.’ (C.T. 131).”

15. “‘Although, as previously mentioned, the prior

art not considered by the Patent Office would have added nothing material to that which was considered, each article of that art, would have added something to the evidence in this proceeding that the Pickrell design was obvious.' (C.T. 131)."

16. On the issues of fact outlined in the pretrial order, the Pickrell patent is invalid for the reasons here mentioned.

17. The agreed facts and opinion shall serve as the Court's findings.

APPENDIX B

DEFENDANT'S EXHIBITS

EX NO	IDENTIFIED	OFFERED	RECEIVED	REJECTED
		(Nos. Refer to R.T.)	(Nos. Refer to R.T.)	(Nos. Refer to R.T.)
DX 2	R.T. 417	417	418	
DX 9	R.T. 417	417	417	
DX 14	R.T. 418	418	418	
DX 23	R.T. 417	417	417	
DX 29	R.T. 445	445	445	
DX 37-2	R.T. 182-183	183, 430	183, 430	
DX 37-3	R.T. 350	417, 430	417, 430	
DX 37-4	R.T. 350	417, 430	417, 430	
DX 51	R.T. 284	292	Not clear	
DX 51-A	R.T. 327	326	327	
DX 51-B	R.T. 327	326	327	
DX 51-C	R.T. 327	326	327	
DX 51-D	R.T. 327	326	327	
DX 51-2	R.T. 312	313	313	
DX 53-1	R.T. 416	416	416	
DX 58	R.T. 417	417	417	
DX 66	R.T. 497	497	497-498	
DX 67	R.T. 497	497	497-498	
DX 75	R.T. 278	279	279	
DX 76	R.T. 294	Not clear	Not clear	

PLAINTIFF'S EXHIBITS

PX 1	R.T. 194	194	194	
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PX 2	R.T. 194	194	194
PX 6	R.T. 194	194	194
PX 9-A	R.T. 206	225	225
PX 9-B	R.T. 206	225	225
PX 9-C	R.T. 206	225	225
PX 9-D	R.T. 206	276	276
PX 25	R.T. 316	316	317

NO. 21,105

In the
UNITED STATES COURT OF APPEALS
For the NINTH CIRCUIT

RPTZ-PATCO., INC.

Appellant,

v.

PACIFIC INLAND NAVIGATION
COMPANY, INC.,

Appellee.

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INTRODUCTION

At the outset, it is noted that appellee has criticized appellant (Appellee's Br. 10)* for not challenging findings of fact. This criticism is considered ill founded for the simple reason that the District Court made no formal findings subject, as such, to specific challenge, but rather treated its findings as follows (C.T. 132):

"The agreed facts and this opinion shall serve as my findings."

Appellant has specified (Appellant's Br. 17-22) the errors upon which it relies with record reference to the portions of the District Court's opinion wherein the errors occur. This treatment is believed as precise as possible and in full compliance with the rules of this Court and, specifically, Rule 18(d). Certainly where the

*As hereinafter used, references to Appellant's Opening Brief are indicated by "Appellant's Br."; references to Appellee's combined Answering Brief and Brief on Cross Appeal are indicated by "Appellee's Br."; references to the Clerk's Transcript of the Record are indicated by "C.T."; references to the Reporter's Transcript are indicated by "R.T."; and references to Plaintiff's and Defendant's exhibits are indicated by "PX" and "DX", respectively.

District Court has made no formal findings, as such, appellant is not required to conjure up findings. To do so would merely burden this Court by requiring that it correlate the conjured findings to the actual findings embodied in the opinion of the District Court.

Rather than dwelling further on appellee's statement of the case and comments regarding findings, appellant will focus attention on the argument portion of Appellee's Opening Brief. It is believed that this treatment is best suited to resolution of the questions actually before the Court (Appellant's Br. 16-17). For this reason, and the sake of clarity, the following sections are captioned with headings corresponding to the sections of the argument portion in appellee's brief to which they pertain.

ARGUMENT

Obviousness

From a reading of appellee's generalizations directed to public interest and free enterprise (Appellee's Br. 14) it appears that appellee would have the Court believe that where these considerations are involved, a patent cannot be upheld. If intended to be this all encompassing, this generalization must be denied. It is the very purpose of

the patent system to promote the progress of the useful arts for the benefit of the public. This is in keeping with Art. I, §8 of the United States Constitution which authorizes the Congress "To promote the Progress of ... useful Arts, by securing for limited Times to ... Inventors the exclusive Right to their ... Discoveries ...".* The patent laws effect the intent of the Constitution by providing a system affording the inventors of inventions satisfying the conditions of patentability prescribed therein the limited benefits of a patent. To deny these benefits simply on the basis that public interest and free enterprise considerations are involved would render the system a nullity.

Appellee's "bold statement" (Appellee's Br. 16)

that:

"No genuine issue existed but that the differences between what Pickrell sought to patent and the prior art would have been obvious at the time of the claimed invention to any person having ordinary skill in the art. (§103)"

*This provision appears in the Constitution spliced together with the copyright provision, which is omitted as not relevant here.

is, more accurately, an opinion based solely on the hindsight opinion testimony of appellee's expert witnesses. The fact that the testimony of appellee's experts on this matter was hindsight opinion has not been controverted, and cannot be controverted, since none of them laid any claim to having seen or conceived the invention before it was made by Mr. Pickrell. The hindsight cloud hangs over the testimony of all of appellee's expert witnesses, including Mr. Newitt, the patent expert. He too laid no claim to having knowledge that anyone had conceived the invention before Mr. Pickrell.

Mr. Pickrell's honesty in admitting that the differences between his invention and the prior art were relatively uncomplicated in construction (R.T. 106-108) does not detract from the invention, or render its conception obvious. When considering Mr. Pickrell's admissions it must be borne in mind that the consideration is being made after the fact, and with previous knowledge of the invention.

Regarding the import of the testimony of appellant's own expert, Mr. Norgaard, quoted at Appellee's Br. 19, it is enough to simply point out that Mr. Norgaard

also did not know of the Pickrell invention before Mr. Pickrell. By his own admission, Mr. Norgaard's comments pertaining to obviousness of construction of the Pickrell invention relate only to construction in hindsight, once given the conception. Appellant again wishes to emphasize the twofold process of every inventive act (see Appellant's Br. 33-36), namely:

1. the conception of the idea by the inventor; and,
2. the application of that idea to the production of a practical result.

When testing invention, inquiry must be made into both of these.

Appellee has urged that the Coast Guard records demonstrate the obviousness of the Pickrell invention (Appellee's Br. 20). Yet it has not shown wherein these records teach, or render obvious, the inventive combination, and specifically the V-shaped cofferdam employed therein. It merely refers to the Coast Guard's requirement that the horizontal cofferdam in the 1934 Barge UMATILLA be enlarged and the Coast Guard's comments relating to plans for proposed barges which were submitted in 1941 and 1957.

Although the plans for the latter barges contemplated the employment of single walled V-shaped cargo holds and the Coast Guard commented on the provision of cofferdams in these barges, no suggestion of a V-shaped cofferdam was made. From the record it does not appear that either of these plans were consummated by the actual construction of a barge. It is interesting to note that at the time these plans were submitted to the Coast Guard, both single walled V-shaped cargo holds and cofferdams, in a general sense, were known. Why then, if the employment of a V-shaped cofferdam as embodied in the Pickrell invention was obvious, as urged by appellee, is it so conspicuously absent from both of the plans and the Coast Guard records? The answer is apparent, it was not obvious.

In effect, the appellee has urged (Appellee's Br. 4) that the reason Mr. Pickrell's invention is absent from the prior art is simply because it was not timely before its making by Mr. Pickrell. In support of this argument, appellee cites the testimony of Mr. L. S. Baier, the designers of the 1934 Barge UMATILLA. The specific testimony of Mr. Baier referred to was in answer to a question by appellee's counsel directed to why Mr. Baier did not design a

V-shaped wheat or grain container with a cofferdam in the Barge UMATILLA and is found at R. T. 412 as follows:

"A Well, at the time this particular barge was designed, the channel upriver, up the Columbia River, was capable of handling a barge of this size, and to build a deeper draft barge which would have been suitable for a V-shaped wheat conveyor, wheat hopper, would have been not economical because you couldn't have loaded the barge to its capacity for lack of water in the river. So this barge was designed to take care of the existing channel at that time and, of course, the Cascade Locks. These barges had to go through, and they were limited to draft likewise. This barge was built to take the maximum draft of the river at that time, the Upper Columbia."

This testimony must be taken for what it is, hindsight conjecture. It should also be realized that this testimony falls far short of answering the obvious inquiries which must be made to establish appellee's contention that timeliness explains the absence of Mr. Pickrell's invention, and particularly the V-shaped cofferdam employed therein, from all of the prior art. In this respect, attention is invited to the following inquiries and comments pertinent thereto:

- 1) How does Mr. Baier's testimony explain the absence of Mr. Pickrell's invention from the great body of prior shipbuilding and

barge art that was not limited to use on the Columbia River? Appellee has cited numerous prior art items which were not limited to shallow draft vessels, such as the oceangoing SINCLAIR PETROLORE (DX 2), but none teach Mr. Pickrell's invention.

- 2) How does Mr. Baier's testimony explain the absence of Mr. Pickrell's invention from the prior art barges used on the Columbia River which employed V-shaped cargo holds, such as the 1957 Barge R-27 (DX 66 and 67)? Certainly, at the time of these barges some practicality or economy must have been expected from the employment of V-shaped cargo holds.

From the history of the art prior to Mr. Pickrell's invention, it cannot be controverted that utility and practicality of barges employing V-shaped cargo holds has long been appreciated. On the record, this art dates from the 1902 patent to McElheny, No. 695,758 (part of composite exhibit PX 6), to the 1956 ship SINCLAIR PETROLORE (DX 2)

and appellant's own barges dated from 1957, as typified by Barge R-27 (DX 66 and 67). It also cannot be denied that the cofferdam art and the rules and regulations relating to the requirements for cofferdams were well known long prior to Mr. Pickrell's invention. On the record this art dates back at least to the 1952 patent to Hudson, No. 2,594,930 (part of composite exhibit PX 6), and the rules and regulations date back to the Coast Guard Rules and Regulations for Tank Vessels (DX 3). The pertinent parts of these Rules and Regulations date back to at least December 31, 1952. With all of this background, no one prior to Mr. Pickrell ever conceived the invention defined by the patent claims here in suit. Once conceived and employed in Tidewater Barges 36 and 37, however, it was quickly copied by appellee, as found by the District Court at C. T. 132, in the construction of accused barges 550, 551 and 552.

The foregoing historical background is of particular significance in establishing "the level of ordinary skill in the pertinent art", one of the basic factual inquiries in testing obviousness under 35 U.S.C. §103 set forth in Graham et al v. John Deere Co. of Kansas et al,

383 U.S. 1, 148 USPQ 459 (February 21, 1966). Specifically, the prior art relating to V-shaped cargo holds and cofferdams demonstrates, as a matter of fact, the level of ordinary skill in the art before Mr. Pickrell's invention and that this level fell short of the invention. In showing this, the history also demonstrates that there had been a long stream of activity in the prior art dating from as early as the 1902 patent to McElheny, No. 695,758 (part of composite exhibit PX6) to the modern day barges of the R-27 type (DX 66 and 67), first constructed in 1957.

Yet no one in the prior art had ever arrived at Mr. Pickrell's invention. They had, to be sure, either avoided the problem solved by Mr. Pickrell's invention, or attempted to solve it in other ways. This can be seen from the many single cargo barges employing V-shaped holds, such as the barge shown in Fletcher patent No. 1,803,105 (part of composite PX 6) and the multiple cargo barges employing tanks separated by cofferdams or other isolation techniques, as demonstrated by Hudson patent No. 2,594,930 (part of composite PX 6). All of this activity, however, can only be taken to establish that Mr. Pickrell's invention was above "the level of ordinary skill in the pertinent art", and the impropriety of relying upon hindsight and conjectural testimony to establish this level.

The activity following Mr. Pickrell's invention is also of relevancy to the secondary considerations under 35 U.S.C. §103 treated by the Supreme Court in the Graham case as follows:

"***Such secondary considerations as commercial success, long felt but unsolved needs failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to be patented. As indicia of obviousness or nonobviousness, these inquiries may have relevancy. See Note, Subtests of 'Nonobviousness', 112 U. Pa. L. Rev. 1169 (1964)." (This quotation is taken from that portion of the Graham decision quoted by the District Court at C. T. 129.)

The specific activity referred to is the construction, under Mr. Pickrell's auspices, of two barges incorporating the invention (Nos. 36 and 37) by Tidewater Barge Lines at an expense of about \$600,000 (R. T. 83-87), and the construction of the accused barges (Nos. 550, 551 and 552), found by the District Court to have been constructed in accordance with the claims of the Pickrell patent here in issue (C. T. 132). The quick adoption of the Pickrell invention by both the Tidewater barges and the accused barges, at a considerable expense, must be interpreted as the type of indicia which the Supreme Court had in mind when it commented on the "secondary considerations" to be made under 35 U.S.C. §103 in the Graham decision. Also of significance on this point

is the testimony of Captain Lew Russell, Manager of Tide-water Barge Lines, indicating that Barges 36 and 37 were successful (R.T. 151-154), and the absence of any testimony or other evidence denying or negating the success of the invention as employed in accused Barges 550, 551 and 552.

Prior Art

The prior art covered in appellee's brief corresponds to that noted as pertinent and categorized in appellant's opening brief, with the exception that it adds McElheny patent No. 695,758 (DX 14 and part of composite PX 6). This patent was of record before the Patent Office in the prosecution of the application which matured into the Pickrell patent and may be included in the gravity unloading art categorized at pages 8 and 9 of appellant's opening brief. Insofar as the Pickrell invention is concerned, the McElheny patent is pertinent only in that it shows a single walled V-shaped cargo hold and, accordingly, it does not add materially to the teachings of the art so previously categorized.

At page 24 of its brief appellee has commented as follows:

Therefore, it is reiterated that without combining any reference with the UMATILLA it is a complete anticipation of the claims of the Pickrell patent in issue."

This, at least in a patent sense, is a most unusual use of the term "complete anticipation".* With respect to this use, it is believed enough simply to point out that appellee is apparently commenting on its opinion that even without employing the teachings of any of the other prior art, it would have been obvious, within the terms of 35 U.S.C. §103, to modify the UMATILLA (DX 53) to correspond to the claims of the Pickrell patent in issue. Appellee cannot, consistently, urge that the "complete anticipation" it refers to is the conventionally used 35 U.S.C. §102 anticipation, since it has long since abandoned any defense based on this statute, as evidenced by its brief as follows (Appellee's Br. 13):

"The statutory test in determining whether the patent was valid is 35 U.S.C. §102 and §103. In this appeal only §103 is involved.***"

(emphasis supplied)

*National Lead Company v. Western Lead Products Company, 324 F2d 539, 139 USPQ 324 (C.A. 9 - 1963); Stauffer v. Slenderella Systems of California, 254 F2d 127, 115 USPQ 347 (C.A. 9 - 1957)

Appellee's following reference (Appellee's Br. 25) to the "statutory bar" presented by Barge R-76 is also in need of clarification:

***Since it was delivered approximately December 23, 1957, it is a statutory bar with respect to the Pickrell patent which was filed more than one year thereafter, namely on April 6, 1959."

Although Barge R-76 antedated the application for the Pickrell patent by more than one year and, accordingly, cannot be avoided as part of the prior art, it is not a true statutory bar in the 35 U.S.C. §102(b) sense for the simple reason that it does not disclose or use the invention in the manner required by statute in this language:

"A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, ***"

To constitute a "statutory bar" to the obtaining of a patent, this statute requires the specified use or disclosure be of the invention. Under the statute, a piece of prior art falling short of the invention, such as Barge R-76 in the instant case, is not a bar to obtaining

a patent on the invention, even though it may have an effective date antedating the application for the patent by more than one year. It is noted that appellee has, in effect, admitted that Barge R-76 would require modification to arrive at the invention covered by the claims of the Pickrell patent in issue.

The appellee's conclusions (Appellee's Br. 24-29) suggesting several alternative techniques which might be employed to modify the various items of prior art to arrive at the Pickrell invention must, together with the testimony upon which they are based, be weighed, realistically, as hindsight conjecture. These conclusions fail to explain the absence of Mr. Pickrell's invention from the active and well developed body of prior art which preceded it. The credibility of these conclusions is suspect from the very fact that they assume knowledge of Mr. Pickrell's invention and work from that point to explain how the prior art might be modified.

Appellee has urged (Appellee's Br. 28) that the hindsight allegation has not been substantial because no one so testified. On this point, what more could be

asked than the testimony of Mr. Glosten, the architect of the accused barges, admitting that prior to the appellant's Barge 36 he had never seen a V-shaped cofferdam (R. T. 280-281) and the similar admissions of appellee's experts, such as Mr. Spaulding (R. T. 313). It is also significant no witness laid any claim to having conceived the concept of a barge having a V-shaped cofferdam before having been alerted to the invention of the Pickrell patent.

To lend credence to the hindsight opinion testimony of its witnesses, appellee makes the following observation (Appellee's Br. 28-29):

"***all the witnesses who gave opinion testimony on obviousness related their opinion to 1958 and 1957 and earlier, long before the statutory one year period immediately preceding the filing date of the original patent application."

Although the witnesses may have so back dated their opinions, this does not avoid the hindsight character of these opinions, since they were after the fact and with knowledge of the Pickrell invention. The reference to the "statutory one year period" is totally without efficacy with respect to these opinions. This reference is, presumably, based on 35 U.S.C. §102(b), a statute having no bearing whatsoever on back dated opinion evidence. Attention is here invited

to the quotation and discussion of this statute found, supra, at pages 14-16 of this brief.

At page 29 of its brief, appellee comments that there was "no long felt need incapable of fulfillment" in the instant suit, as presented to this Court in Twentier's Research, Inc. v. Hollister Incorporated, 319 F2d 898, 138 USPQ 473 (C.A. 9, 1963), and makes the following conclusion to support it comments:

"***Both Tidewater's and Pacific's predecessors knew exactly what to do and how to do it.***"

It is respectfully submitted that the historical background (pages 2-10, supra) prior to the Pickrell invention and the immediate adoption of the invention, once made, points to the more logical conclusion that there was a long felt need for the invention and that the "predecessors" did not know "exactly what to do and how to do it". If Tidewater's or Pacific's predecessors had knowledge of exactly what to do to arrive at Mr. Pickrell's invention, where is the evidence of this knowledge? Only hindsight and conjectural testimony has been introduced in an effort to establish this knowledge.

Presumption of Validity

In its argument directed to this subject, appellee cites this Court's 1966 decision in Bentley v. Sunset House

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In its argument directed to this subject, appellee cites this Court's 1966 decision in Bentley v. Sunset House

Distributing Corp., 359 F2d 140, 149 USPQ 152, for the following holding:

"***Nor does the presumption of validity created by the action of the Patent Office. That presumption in any case 'has been in recent years almost reduced to a nullity in patent cases.' [citing cases]***"

The quotation included in this holding is taken from Jacuzzi Bros. Inc. v. Berkeley Pump Co., 191 F2d 632, 91 USPQ 24, a 1951 decision of this Court based on a fact situation wherein there was no express finding by the District Court that the art called to its attention did not add materially to that before the Patent Office during the solicitation of the patent in question. In the instant case, such a finding was expressly made by the District Court (C. T. 123) in the following language:

"***I find that the submission of the teachings of these devices would not have materially added to the prior art which was actually considered by the Patent Office during the course of the prosecution of the Pickrell patent."

It is respectfully submitted that in the Bentley and Jacuzzi Bros. decisions this Court did not intend its comments regarding the nullity of the presumption of validity to apply to the situation of the instant case wherein the art before the Court was found to be no more material to the

patent in question than the art considered by the Patent Office during solicitation of the patent. If applied to such a situation, the presumption of validity attaching to a patent under the 1952 Act (35 U.S.C. §282) would, indeed, always be reduced to a nullity, regardless of the fact situation involved. This would be contrary to the dictates of this Court set forth in Patterson-Ballagh Corporation v. Perry M. Moss et al, 201 F2d 403, 96 USPQ 206 (see page 42 of Appellant's Opening Brief), a 1953 decision subsequent both to the Jacuzzi Bros. decision and the enactment of the 1952 statute.

Additional Grounds for Affirming
the Finding of Invalidity

Appellee's comments under this heading, in essence, boil down to one allegation. Namely, it is urged that the conduct of the patentee in not disclosing everything he knew to the Patent Office during the course of the prosecution of his patent resulted in a "misuse" which renders the patent unenforceable. This allegation has been fully considered and dismissed by the District Court as being unfounded (C. T. 120-121). It is not seen that further elaboration here would add to the already thorough findings of the District Court on this point.

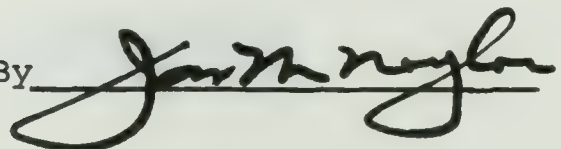
CONCLUSION

The crux of appellee's argument urging invalidity of the claims of the Pickrell patent in issue (Nos. 1, 6, 8 and 11) is seen to revolve around the allegation that the advancement of the patent represented no more than a timely innovation which was obvious within the provisions of 35 U.S.C. §103. On the basis of the historical backbround leading up to the invention forming the subject matter of these claims, and the conspicuous absence of credible evidence establishing obviousness, appellee's plea must be denied.

Respectfully submitted,

JOHN R. GILBERTSON
JAMES M. NAYLOR
JOHN K. UILKEMA
Counsel for Appellants

By

A handwritten signature in dark ink, appearing to read "James M. Naylor", written over a horizontal line.

Appellee.

Attorneys for Appellant

STATEMENT OF JURISDICTION

Cross-appellee accepts cross-appellant's statement of jurisdiction (Appellee's Br. 41).

STATEMENT OF THE CASE

This subject is covered in pages 1 to 17 of appellant's opening brief, which pages are herein incorporated by reference. Pages 14 to 16 of the recital found on these pages, entitled "The Accused Construction" bear particularly on the issues here under consideration.

The questions involved in this cross-appeal are raised by the District Court's holding at C. T. 132, quoted here for convenient reference:

"***If the Pickrell patent is declared valid, then I would have no hesitancy in holding that defendant's barges, built, converted and operated by defendant infringed Claims 1,6,8 and 11 of the patent in suit in the specifications as set forth in paragraph 2, subdivisions (a), (b), (c) and (d) on pages 8 and 9 of the pre-trial order; that the acts of infringement were knowingly, willfully and wantonly committed and that plaintiff would be entitled to injunctive relief against further infringements.***"

This holding raises the following questions for determination if the Court here reverses the judgment of the District Court by finding that Claims 1, 6, 8 and 11 of the Pickrell patent, or any one or more of them, are valid:

1. Did the District Court err in finding that the accused barges (Nos. 550, 551 and 552) would infringe Claims 1, 6, 8 and 11 of the Pickrell patent if these claims were declared valid?
2. Did the District Court err in finding that, if Claims 1, 6, 8 and 11 of the Pickrell patent were declared valid, their infringement by the defendant (cross-appellant) was knowingly, willfully and wantonly committed?

CROSS-APPELLANT'S NON-INFRINGEMENT ARGUMENT

Under the heading of "Non-infringement", cross-appellant urges that the cofferdam construction in the accused barges is neither continuous nor V-shaped, in the sense

called for in the claims of the Pickrell patent in issue,
As a preface to the following discussion, cross-appellee
reminds the Court that the claims in suit (1, 6, 8 and 11)
fall into two categories, namely:

- a) Claims 6 and 8 which cover the combinations including the V-shaped cofferdam and the collection pit therein, but make no reference to access to the interior of the cofferdam.
- b) Claims 1 and 11 which cover the V-shaped cofferdam and the access provision therefor.

Distinction between these two categories is of particular significance because cross-appellant argues that the accused barges avoid infringement of the claims because the cofferdam structures therein are not continuous in the sense that the interiors thereof are not completely accessible from one entry. It is submitted that even if this argument is considered convincing, it is ineffectual to avoid claims 6 and 8, because these claims make no reference to access to the interior of the cofferdam structure.

The Continuous Character of the Cofferdam
Structure in the Accused Barges

Aside from the fact that one of the very contentions upon which cross-appellant relies to urge non-infringement is completely unsupported by two of the claims, namely the alleged complete access requirement, cross-appellant's argument is defective as to all of the claims for the simple reason that it puts a totally unrealistic interpretation on the word "continuous". Mr. Pickrell, the patentee, did not intend that the V-shaped cofferdam of his invention must be one continuous cofferdam structure without interruption of any kind, but rather that the V-shaped device in the environment described should function as and for a cofferdam. In other words, Mr. Pickrell contemplated that even if the V-shaped cofferdam were compartmented or divided by separating plates, the resulting structure would still function as a cofferdam. Any other interpretation of the patent in suit would be abortive and defeat the purpose of the award of the letters patent.

The continuous nature of the cofferdam structure in the accused barges is evident upon observation, as can

be seen from DX 75 (reproduced at Appellee's Br. 44) and, in more detail, from PX 9A to D, inclusive. It has also, effectively, been conceded by Mr. Spaulding, one of cross-appellant's naval architect experts at R. T. 392-393 as follows:

"Q. Well, by that I mean is there any interruption by a non-cofferdam area anywhere between the sides?

A. No, there is a continuous cofferdam structure which is divided into a series of cofferdams.

Q. But the effectiveness of the cofferdam is continuous from side to side, is it not?

A. Yes, when you consider the interpretation of the requirements of the U.S. Coast Guard there is an effective cofferdam from one side of the vessel to the other. However, there is not access from one side to the other.

Q. I didn't ask you about access yet. I am coming to that.

A. Right."

Mr. Newitt, cross-appellant's patent expert, even admitted that there is no non-void space between the cofferdam extending in abutting relationship from side to side of the accused vessels (R. T. 486-488), as did Mr. Glosten, the architect who designed the vessels for the cross-appellant (R. T. 273-275).

The word "continuous" is not new in patent claims and it has been given a juridical meaning wholly realistic and consistent with the cross-appellee's position here. Thus, in Nachman Spring-filled Corp. v. Spring Products Corp., 68 F (2d) 829; 21 USPQ 91 (CA 2) an argument much like that which cross-appellant here is poised to make was urged and rejected. The District Court (at 17 USPQ 185) held that the patent in suit was not infringed in that the Defendant's device did not respond to the claims thereof. The Second Circuit reversed.

The patent in suit was for a spring cushion construction, the novelty of which was that it embodied a complete, permanently assembled spring casing containing complete individual pockets each wall of which was composed of a single thickness of fabric. The cell walls were so placed as to separate each spring from the adjacent spring and prevent contact therewith so as to insure free movement of the separate springs and to avoid metallic sounds. The cells were formed by parallel continuous partitions the edges of which were stitched or otherwise suitably fastened to the top and bottom layers. Operating with these partitions were transverse partitions or division walls, each of which was formed of an unbroken web of material.

Defendant had cut the one-piece partitions into several sections by removing fractions of the wall at points intermediate of the successive springs. The Court in discussing whether or not this constituted infringement said:

"All appellee has done is to cut the one-piece partitions, illustrated in the patent in suit, into several sections by removing fractions of the wall at points intermediate of the successive springs, where those fractions serve no function, and while appellee's walls are made of a number of pieces of fabric which are separate before being assembled in the casing, when they are once sewed in place in a single plane, they are permanently held in that plane and constitute the continuous walls of the claims."

Thus, the Court interpreted the term "continuous" to include a segmented portion where the segmentation served no useful purpose except to avoid infringement.

In an earlier case, namely, Whitlock Coil Pipe Co. v. Mays Radiator Co., 266 Fed. 215, (CA 2), the same Court had dealt with substantially the same argument (as cross-appellant has here urged) in much the same fashion. The subject invention consisted of a radiator which the claims defined as composed of a "continuous" strip of sheet metal. The Defendant's product used two pieces soldered together. The District Court held there was no infringement.

In reversing, the Court of Appeals, in treating with the term "continuous", said:

"***continuous may and here should be taken in a mechanical sense; and two pieces of metal contiguously placed and soldered together may be considered as a continuous piece when together they function like one piece."

In a still earlier case, namely, Brown v. Reed Manufacturing Co., 81 Fed. 48 (cir. ct. N.D.N.Y., 1897), the patent claimed a pan with perpendicular sides provided with a continuous loop and an intermediate "continuous" zinc plate in a groove or recess. The Defendant's product used two strips of zinc which were joined together. The Court in finding infringement, said:

"It seems clear beyond question that the defendant's strip is 'continuous' in a mechanical and an electrical sense and also according to the ordinary dictionary meaning of the word. Many pieces of twine may be tied together to form a continuous kite string, many different breadths may be united to form a continuous carpet and surely two pieces of zinc may be soldered together to form a continuous strip."

And so it is in the instant case: cross-appellant, by interposing plates to compartment the cofferdam, did not avoid infringement of the claims in suit for the cofferdam

was nonetheless "continuous" in the sense of extending from side to side of the hull from substantially the deck line downwardly and inwardly toward the bottom in a substantially V-shaped cross-sectional outline. It is respectfully submitted that the District Court was correct in finding, in effect, that the cofferdam structures in the accused barges were "continuous".

The V-Shaped Character of the Cofferdam
Structure in the Accused Barges

To call the cofferdam structure in the accused barges a "W-shaped" cofferdam borders on the ridiculous. This is believed readily evident from the very exhibit relied upon by cross-appellant to illustrate its point (DX 75, reproduced at Appellee's Br. 44). The absurdity of this characterization is emphasized by the obviously inconsistent use of the term "V-shaped" by cross-appellant at Appellee's Br. 6 when referring to the 1957 proposal to the Coast Guard (reproduced at Appellee's Br. 7).

The cofferdam structure of the accused barges includes so little of the characteristics of a true "W" to render the same insignificant, for the purposes of

testing infringement. To cross-appellee it represents nothing more or less than the change of form touched upon by Judge East in Webster v. Speed Corporation, 158 F.S. 472, 115 USPQ 285 (D. C. Ore., 1957) [modified at 262 F2d 482, 120 USPQ 256, as to an award of attorney's fees only] when he quoted Judge Fee's remarks from Myers v. Beall Pipe and Tank Corporation et al, 90 F. Supp. 265, 79 USPQ 173 (D.C. Ore. 1948), as follows:

"In attempting to avoid the claims of infringement, it is also argued that the form of the structure does not fall within the claims of the Myers patent. It is fairly obvious that a great deal of effort has been gone to in order to change the form so that it would look different than the Myers patent, but imitation of essentials is the truest flattery and also points to the reality of infringement. Any equivalent of a reach with proper devices for attachment, so that traction is transmitted to the frame and to the ground engaging elements, is sufficient to satisfy a finding of infringement. The attempt to differentiate the accused construction from those of the patent, because the means of attaching and supporting the reach are not identical is made by subtly fallacious reasoning."

It is worth noting, of course, that nowhere does cross-appellant lay any claim that the so-called W-shaped cofferdam is materially different in utilitarian characterization than the V-shaped device.

Being continuous, as we have pointed out, the small cross-sectional or profile differences between the cofferdam of the accused devices and the patented device are of no material significance. Functionally and structurally they serve the same purpose as the cofferdam structure of the patent and are equivalent thereto. Thus, the District Court, correctly, reached the inescapable conclusion when it found (C. T. 119):

"***I do not distinguish between the so-called W-shape used by the accused and the V-shape patented by Patco."

CROSS-APPELLANT'S FILE WRAPPER ESTOPPEL ARGUMENT

We have no quarrel with cross-appellant's definition of the two categories of file wrapper estoppel, nor the cases that were cited, but we do dispute the contention that there are any file wrapper estoppels in the instant case which will give cross-appellant the aid and comfort that it seeks.

The First Asserted File Wrapper Estoppel

As to this estoppel, namely, the cancellation of broader claims in response to a rejection by the Patent Office,

let it be clearly understood that cross-appellee has not sued on canceled Claims 1 and 2. It has, however, brought suit on Claims 1, 6, 8 and 11 of the patent and fully demonstrated that these claims are infringed by the accused barges since they embrace the spirit and substance of the Pickrell invention as defined therein.

Cross-appellant has failed to point out wherein any file wrapper estoppel exists with respect to the claims sued on.

The mere fact that a patentee elects to cancel certain claims and continue the negotiations with the Patent Office for the procurement of other and different claims, does ^{NOT} bar such patentee from the right to enforce the claims obtained. This is precisely the situation here and, so long as it appears that the cross-appellant has infringed certain of the claims allowed, it matters not [in the absence of a showing of a true estoppel] that other and different claims fell by the wayside.

See: Payne v. Williams-Wallace Co., 117 F. (2d) 823, 48 USPQ 575, C. A. 9); (cert. den. 313 US 572). The Court made this cogent observation (48 USPQ 580):

"The rejected claims were for different combinations, and as we understand it any estoppel could extend no further than to the canceled combinations. Johnson v. Philand Co., CCA 9, 96 F.2d 422, 444 [37 USPQ 570, 573]."

The Second Asserted File
Wrapper Estoppel

This claimed estoppel, if recognized, could not apply to Claims 6 and 8 because these claims do not relate to access to the cofferdam. We will therefore discuss it in relation to Claims 1 and 11, only, and thus avoid the confusion that would otherwise arise from cross-appellant's generalization. This confusion even pervaded the record, as witness Mr. Newitt's reluctance to categorize the claims. (R.T. 489).

The file history is not denied by the cross-appellee. It is true that Mr. Pickrell's attorney went so far as to argue that the interior of the cofferdam is substantially completely accessible. However, Claims 1 and 11 are not limited by their language to this access being complete from the deckline as is urged by the defendant. Specifically, as to claim 1, this access provision is recited

as follows:

"said lateral portions of said cofferdam structure having means at approximately the deck line of the hull providing for entry into said cofferdam structure."

Claim 11 similarly recites this access provision as follows:

"said cofferdam having access means opening into the non-cargo chamber therein from the area above the deck to permit inspection of said non-cargo chamber independent of the loading of either or both of said holds."

Accordingly, it can be seen that although the complete access requirement of the patentee's cofferdam was urged in the prosecution of the patent, the provision that this access be complete from the deckline is not claimed. The interpretation of the doctrine of file wrapper estoppel under such circumstances was made clear in Bryan v. Garrett Oil Tools, Inc., 245 F. (2d) 365, 114 USPQ 10 (CA 5, 1957) wherein we find the following:

"***Moreover Bryan is not estopped from claiming broadly enough to include the Garrett valves since in pursuing his application in the Patent Office he did not change the wording of his claim or otherwise limit it, but merely explained to the satisfaction of the examiner where- in the Bryan invention differed from the Otis one--and the distinction is based on the inclusion of the same features that the accused tools also have."

(emphasis supplied)

With respect to the accused structure and the compliance thereof to the access provision of Claims 1 and 11 of the Pickrell patent (as set forth above), attention is directed to the fact that the cofferdam of the accused structure is completely accessible and that, in large part, this access is provided at the deckline (See PX 11A, first picture, and the reference thereto at R. T. 227-228). Thus we hark back to the fact that cross-appellant has elected to avoid the consequences of infringement by the production of a device that is imperfect in construction and mode of operation. The result must be looked upon for what it is, an attempt to evade by imperfect infringement. The infringement is imperfect only insofar as ease of entry is concerned, since the accused structure provides full access to the interior of the cofferdam, whether the vessel is loaded or not. Thus, the departure of the accused structure will not avoid the infringement. See Corpus Juris Secundum, Vol. 69, p. 864, §294, and the cases there collected and discussed. Among others, Nachman Spring-Filled Corp. v. Spring Products Corp., 68 F2d 829, 21 USPQ 91 (C.A. 2), is noted. In that case it was said:

"***It is not a departure from the objects and advantages of the patent. Infringement is not avoided by an infringer utilizing the patent in a less efficient form than that described in the patent or in deliberately impairing some object of the invention by way of evasion. Winans v. Denmead, 15 How. 344, 14 L. Ed. 717; Telescope Cot Bed Co. v. Mine & Smelter Supply Co., 215 F. 100 (C.C.A. 9); Nathan v. Howard, 143 F. 889 (C.C.A. 6). The appellee has not omitted any element of the patented structure. It has partitions extending transversely and also partitions extending longitudinally which function exactly as do the partitions of the patent in suit."

It is submitted that both the established law and the facts here involved support the District Court's finding (C.T. 132):

"Defendant has failed to prove an estoppel against plaintiff in the manner charged in the pre-trial order."

CROSS-APPELLANT'S WILLFUL INFRINGEMENT ARGUMENT

In considering whether the District Court was correct in finding (C. T. 132) that if the Pickrell patent is valid, then the acts of the cross-appellant amounted to knowing, willful and wanton infringement, it is necessary to weigh the evidence, or lack of it, upon which the Court, presumably, based its findings. This may be outlined

as follows:

- 1) The cross-appellant made no pretense or showing, whatsoever, that it investigated its patent position or sought the advice of patent counsel before hiring Mr. Glosten to proceed with the design of the accused barges.
- 2) The cross-appellant made no pretense or showing, whatsoever, that in causing the accused barges to be designed and built, it followed any of the prior patents or public uses made known at the trial.
- 3) The cross-appellant, possessed of a set of prints of the drawings of the barges constructed according to the patent under Mr. Pickrell's auspices (Tidewater's Barges 36 and 37), took advantage of Mr. Glosten's design of Barges 550, 551 and 552, after Mr. Glosten had examined the prints of the drawings and inspected Barges 36 and 37.

- 4) The design of accused Barges 550, 551 and 552 corresponded substantially to the design of Barges 36 and 37 with the exception of a deviation without significance in patent law, namely, the interposition of plates in the transverse profile or cross-sections of the V-shaped cofferdam, without the loss of the continuous nature of the cofferdam in a functional sense.
- 5) The cross-appellant has never contacted cross-appellee about use of the accused barges (R. T. 161).

The wanton character of the cross-appellant's activity is seen most vividly from the evidence of copying threaded throughout its relationship with Mr. Glosten, the designer of the accused barges. Mr. Glosten was requested, in early 1962, by Mr. John Bullock, President of the cross-appellant, to undertake a project of designing barges to fill its need for barges to operate on the Columbia River and to carry grain and petroleum. There were discussions as to a good many barges in cross-appellant's fleet; discussions of competitors' barges and this included Tidewater's

Barges 36 and 37 (R. T. 255-256). Mr. Glosten was engaged in the making of drawings for Barges 550, 551 and 552 for a "matter of several months". In that period, he saw one of the patented barges [he doesn't recall which one] under construction in Albina Shipyards (R. T. 258). He was invited to go aboard and did so. Toward the end of the period of designing the 550 series of barges, Mr. Glosten was in Pasco, with the drawings, for discussion with some of the cross-appellant's people and again, went upon one of the cross-appellee's barges, which was tied up at the pier. He was accompanied by a man from cross-appellant's petroleum operations [Richard Boyles] and a man concerned with management of cross-appellant's wheat transportation [Carl Floten] (R. T. 254-263).

Mr. Glosten saw a set of drawings* of either Barge 36 or 37 [the patented barge] in the offices of the cross-appellant [Pacific Inland] within a few days of the time he visited the barge being completed at Albina in 1960. The drawings were "rolled up and unrolled". He believes there were four (4) drawings which, while no means a complete set of drawings such as he was accustomed to turn out for a barge, nevertheless he believed that a barge

*Mr. Glosten admitted seeing them on more than one occasion (R. T. 275)

could not have been built from the drawings (R. T. 262-264).

In inspecting the drawings, Mr. Glosten discerned that there was a dry cargo space having a bottom that was generally V-shape in cross-section and that there was a cofferdam immediately below the dry cargo space. Prior to seeing these drawings, Mr. Glosten, an experienced naval architect [with practical experience in the operation of tugs and barges (R. T. 250)], had never seen a structure in which there was a V-shaped cofferdam (R. T. 264-265).

With this head start, Mr. Glosten completed the design of accused Barges 550, 551 and 552, as evidenced by PX 9.

Cross-appellant's comments (Appellee's Br. 61) concerning the opinions of its naval architect and patent experts on the patentability of the Pickrell invention are of no probative value in establishing the character of the infringement here under consideration. The naval architect experts, Messrs. Carson and Spaulding, have not been qualified as patent experts. Furthermore, their opinions were

made in hindsight fashion, after the fact. Mr. Newitt, the patent expert, was not called upon for an opinion until 1964 (R. T. 479), long after the accused barges had been constructed and put into operation. Therefore, his opinion is of no weight in establishing that the cross-appellant acted in good faith when carrying its plan through construction and operation of the barges.

Against the backdrop surrounding cross-appellant's activity in making and using the accused barges, and the absence of any evidence of probative value establishing that the activity, and particularly the copying aspects thereof, was in good faith, it is submitted District Court was correct in its findings as to the character of this activity.

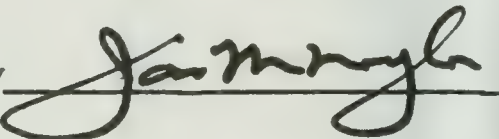
CONCLUSION

The evidence before the District Court supports its findings both with respect to infringement and the knowing, willful and wanton character of this infringement.

Cross-appellant has failed to sustain the burden of establishing that either of these findings are in error.

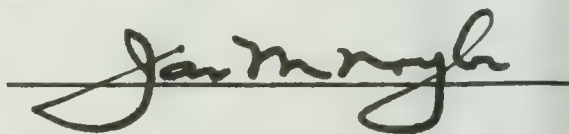
Respectfully submitted,

JOHN R. GILBERTSON
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By 

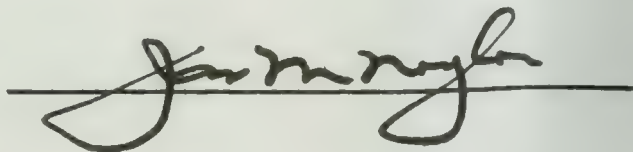
CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.



CERTIFICATE OF SERVICE

The undersigned hereby certifies that three (3) copies of the foregoing APPELLANT'S REPLY BRIEF AND ANSWERING BRIEF ON CROSS-APPEAL have this first day of December, 1966 been sent by first class air mail to Mr. John Gordon Gearin, 800 Pacific Building, Portland, Oregon 97207, the principal attorney for Appellee.



No. 21105

In the
United States Court of Appeals
For the Ninth Circuit

RPTZ-PATCO, INC.,
Appellant and Cross-Appellee,

v

PACIFIC INLAND NAVIGATION COMPANY, INC.
Appellee and Cross-Appellant.

**REPLY TO ANSWERING BRIEF
ON CROSS-APPEAL**

Appeal from the United States District Court
for the District of Oregon

HON. JOHN F. KILKENNY, Judge

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FEB 15 1967

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**United States Court of Appeals
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Appellee and Cross-Appellant.

**REPLY TO ANSWERING BRIEF
ON CROSS-APPEAL**

IN GENERAL

The subject of the cross-appeal is covered on pages 41 through 63 of Pacific's Brief and this Reply will be limited to answering PATCO's Answering Brief on the cross-appeal with respect to the question of infringement.

Pacific agrees with the statement of the issues raised by this cross-appeal as set forth on page 24 of the Answering Brief of PATCO.

PACIFIC'S INFRINGEMENT ARGUMENT

Starting at page 24 of the Answering Brief, PATCO discusses Pacific's argument with respect to non-

infringement and attempts to categorize the four claims in suit; namely claims 1, 6, 8 and 11, into two categories to the effect that claims 6 and 8 make no reference to access to the cofferdam, while claims 1 and 11 include access provisions therefor. However, it is urged that such categorization cannot properly be made.

An inspection of the claims in issue of the patent in suit (DX 1) reveals as follows:

Claim 1 is limited to a V-shaped single, continuous cofferdam construction extending from the deck line of the hull and meeting at the bottom, with means at the deck line of the hull providing for entry into the cofferdam structure.

Claim 6 is likewise limited to a single continuous V-shaped cofferdam structure joined at the bottom of the hull and includes a grain collection pit which is also cofferdammed.

Claim 8 is limited also to a single V-shaped cofferdam structure extending downwardly and inwardly to the deck line of the hull and also includes a cofferdammed pit, but differs from claim 6 in that it also includes vertical cofferdams adjacent the ends of the V-shaped cofferdam.

Claim 11 is like claim 1 in that it does not include either the cofferdammed collection pit or the vertical

cofferdams, but is limited to a single V-shaped continuous cofferdam construction with access means to the cofferdam from an area above the deck to permit inspection thereof.

It is elementary that claims of a patent must be read in the light of the specification, drawings, proceedings in the Patent Office, including the contents of cancelled claims, positions taken in the trial on behalf of the patentee, as well as the prior art. When these rules are applied, there is no doubt that all of the claims must be read as being limited to a single, continuous V-shaped cofferdam in which the following four characteristics are present, *none of which is present in the accused construction*. The four characteristics are as follows:

1. Access must be provided to the entire V-shaped cofferdam structure from either side thereof.
2. Visual inspection must be possible from either side of the V-shaped cofferdam structure, including the bottom thereof.
3. It must be possible to gas-free the entire V-shaped cofferdam structure from one side thereof.
4. It must be possible to visually inspect the interior of the void surrounding the grain collection pit from points within the main cofferdam structure.

First, referring to the specification of the patent in

suit (DX-1), the Court's attention is directed to the following excerpts:

"* * * The cofferdam structure has side portions 48,50 along each side of the hull, which slope downwardly and inwardly from a side and which join at the longitudinal centerline of the hull." (Column 2, lines 61-67).

"* * * The void between wall structure 140 and the inner walls of pit 130 connects with the voids of the portions of the V-shaped cofferdam directly adjacent thereto, which feature enables visual inspection of the interior of the void surrounding the pit from points within the cofferdam." (Column 4, lines 70-75).

"Each compartment of the liquid cargo space and each compartment of the cofferdam is accessible for repair purposes from points located on both sides of the hull and outwardly of the edges of the dry cargo space, and at the deck line defined by deck 108." (Column 5, lines 1-5).

"From the above description it will be seen that there is accessibility to all portions of the liquid cargo space, and to the entire interior of the cofferdam, and the accessibility is there regardless of whether dry cargo is present in the dry cargo space. Further, this accessibility is realized using a relatively simple, rigid construction." (Column 5, lines 50-55).

"The V-shaped cofferdam structure has peculiar advantages. Accessibility is provided to all parts of the liquid cargo space and to all compartments of the cofferdam, and this is from both sides of the vessel and from locations spaced outwardly of the dry cargo bin space." (Column 6, lines 61-65).

The specification of the patent in suit stresses all of the characteristics set forth above not present in the accused structures, except the feature of gas-freeing from one side of the cofferdam structure. However, this feature was stressed at the trial by the inventor Pickrell (R.T. 61-62):

“Q Reference is made in the patent to access to the cofferdam. Could you tell the Court where that is and what its purpose is?

“A Well, it is approximately there (indicating) in the deckline, and the purpose of this is to get access. Anyone working around petroleum, obviously, you want all the safety factors you can possibly install in a barge. We have two manholes, one on each side, for easy admittance, and also to put a venter on one side and open the other side so we get direct, clean ventilation under pressure to remove all the gas fumes, because if you don't, the gas fumes lay heavy in the bottom of the barge and it is almost impossible to remove these fumes in those dead spaces without having a thorough ventilation system.

“Q When you speak of gases, Mr. Pickrell, are you speaking in any sense from personal experience?

“A Yes, sir. We have had a barge on fire, and if a person is caught in a dead space like that and the barge is aflame, you don't know just what you might do. It is nice to have these openings, sufficient openings, for a safety factor to get out.”

Actually, Pickrell included a fifth characteristic not found in the accused structures; namely, a safety factor

for a person who might be caught in the cofferdam if there is a fire.

From the foregoing, it is urged that when the claims are read in the light of the specification and also in the light of the inventor's testimony as to the reasons for the particular construction disclosed in the patent in suit, the accused barges do not infringe. This is further fortified by reference to FIG. 3 of the drawing of the patent in suit which shows a continuous V-shaped cofferdam structure having all of the characteristics referred to, it being noted that no alternate construction is disclosed and that no mention is made either that an alternate construction could be used or that the disclosed construction is not required.

With respect to the proceedings in the Patent Office and prior art, these are covered in the Brief on Cross-Appeal. However, at pages 46-47 of the Brief on Cross-Appeal, it is stated that original claim 1 read as quoted on those pages.

Actually original claim 1 read somewhat differently. That claim as amended, never allowed and subsequently cancelled did read as quoted at pages 46-47 of the Brief on Cross-Appeal. So that there will be no confusion, claim 1 as originally presented is reproduced below, and the amendments made to it in the first amendment are shown as they appear in the certified

copy of the file wrapper of the patent in suit the deleted portions and the strike in constituting the amendment.

With the amendments, the claim reads as quoted on pages 46-47 of the Brief on Cross-Appeal:

“1. A cargo vessel comprising a hull having sides and a bottom, and means within the interior of the hull defining an elongated cargo space for dry cargo, the latter means comprising a cofferdam structure having opposed side portions, one on each side of the hull, each side portion extending downwardly into the hull and sloping inwardly from the side of the hull, said cofferdam structure having a continuous top surfacing defining the bottom of the cargo space for a dry cargo and a continuous bottom surfacing which, together with the bottom and sides of the hull, defines a second cargo space adapted to carry liquid cargo, said top and bottom surfacing being separated by a void.” (DX 29, page 16).

It is noted that original claim 1 and that claim as amended by the first Office Action has no reference to access or entry to the cofferdam for inspection thereof throughout its entirety including the bottom. However, as pointed out in the Brief on Cross-Appeal, not only the specification and the drawings of the patent in suit limit the claims, but the statements concerning access, V-shaped (as distinguished from the W-shape of the access parts), visibility for inspection and the like were made with respect to a claim which had none of these features

recited therein. *Therefore, the same arguments must apply to the claims of the patent in suit whether they specifically spell out these features or not.* It follows, therefore, that it is improper to attempt to categorize the four claims of the patent in suit in order to provide a basis for them being infringed as such categorization has been attempted.

The law of the Ninth Circuit and the United States Supreme Court is well settled with respect to the construction of patent claims.

The leading Supreme Court case is *Schriber-Schroth Co. v. Cleveland Trust Co.*, (1940) 311 U.S. 211, 61 S.Ct. 235, 85 L.Ed. 132.

Where the claim uses broader language than the specification, reference may be had to the latter for the purpose of *limiting* the claim. See *McClain v. Ortmyer*, 141 U.S. 419, 12 S.Ct. 76, 35 L.Ed. 800; *Magnavox Co. v. Hart & Reno*, (C.C.A. 9 1934) 73 F.2d 433, and *Lanyon v. M. H. Detrick Co.*, (C.C.A. 9 1936) 85 F.2d 875.

A recent case on this point in the Ninth Circuit is *Oregon Saw Chain Corp. v. McCulloch Motors Corp.*, (C.A. 9 1963) 323 F.2d 758. This case and the cases cited therein point out not only that the claims of a patent must be understood and interpreted in the light of its specifications, but that the specifications can be used only to limit claims and not to expand them; further-

more, that if a patentee describes and claims only a part of his invention, he is presumed to have abandoned the residue to the public. This case has been cited in Pacific's main Brief on the doctrine of file wrapper estoppel.

The Court's attention is also directed to the case of *Nelson v. Batson*, (C.A. 9 1963) 322 F.2d 132. That case stands for the proposition that there is no legally recognized or protected "essential" element, "gist" or "heart" of the invention in a combination patent. PATCO apparently is attempting to take the position that Pacific has appropriated the "heart" of the alleged Pickrell invention, but since the Pickrell patent is a combination patent in a narrow field, this contention is untenable in view of the law of this Circuit, as well as the law of the Supreme Court.

PATCO'S ARGUMENT WITH RESPECT TO THE CONTINUOUS CHARACTER OF THE COFFERDAM STRUCTURE IN THE ACCUSED BARGES

PATCO argues that Pacific's argument as to non-infringement places a totally unrealistic interpretation on the word "continuous". The statement is made on page 26 of the Answering Brief, as follows:

"Mr. Pickrell, the patentee, did not intend that the V-shaped cofferdam of his invention must be one continuous cofferdam structure without interruption

of any kind, but rather that the V-shaped device in the environment described should function as and for a cofferdam.”

This is an entirely new theory of PATCO and is completely untenable. As pointed out, no alternative construction except the single continuous cofferdam V-shaped construction is mentioned or suggested in the Pickrell patent, nor is there any statement by Pickrell that the single continuous construction is not essential to his alleged invention. *Oregon Saw Chain*, supra, at page 766, reads as follows, and is controlling:

“We think the language of the Supreme Court in *Snow v. Lake Shore & Michigan Southern Railway Co.*, 1887, 121 U.S. 617, 630, 7 S.Ct. 1343, 30 L.Ed. 1004, is pertinent here. It reads:

“It is not admissible to adopt the arguments made on behalf of the appellants, that this language is to be taken as a mere recommendation (or “preferred form” or “best mode contemplated”) by the patentee of the manner in which he prefers to arrange these parts of his machine. There is nothing in the context to indicate that the patentee contemplated any alternative for the arrangement * * *,”

nor did he describe such arrangement as not essential. Cf. *Fulton Co. v. Powers Regulator Co.*, 2 Cir. 1920, 263 F. 578; *McRoskey v. Braun Mattress Co.*, supra.”

The Court in *Oregon Saw Chain* held the claims not infringed. Our arguments with respect to the effect of file wrapper estoppel are contained in the Brief of Pacific.

At page 27 of the Answering Brief, reference is made to the testimony of Pacific's witnesses, Spaulding, Newitt and Glosten. There is no admission by any of these witnesses that the multiple W-shaped cofferdam construction of the accused barges is the equivalent of the single continuous V-shaped cofferdam construction of the Pickrell patent. Even the quoted portion of Mr. Spaulding's testimony at R.T. 392-393 points out that there are a series of cofferdams in the accused barges. Mr. Spaulding testified at R.T. 393 that four cofferdams are present and are divided by a single plate diaphragm. At R.T. 357-61, Mr. Spaulding testified as to the functional differences with the separate cofferdams of the accused structure and that each space is provided with its own access and its own venting, that the four cofferdams are completely independent of each other and that in the accused barges it is impossible to see all of the surfaces, including the bottom of the cofferdam with one entry; also, that access to the center line cofferdam will be from either end compartment of Ex 9-B.

One of the most important differences and advantages of the accused construction was pointed out by Mr. Spaulding at R.T. 361:

“Q From the standpoint of structural rigidity, referring again to Defendant’s Exhibit 75, which of the two constructions would be preferable?

“A In my opinion, the Pacific Inland barge would be preferable because of the greater depth of hull structure under the grain sump or the recess for the augers.”

At this point, Mr. Spaulding had been asked to compare the structure of the patent and the accused Pacific Inland barge.

See also the testimony of Newitt, Pacific’s patent expert at R.T. 448, lines 8-22.

On page 28 of the Answering Brief, a discussion of the word “continuous” is found and the case of *Nachman Springfilled Corp. v. Spring Products Corp.*, (C.C.A. 2 1934) 68 F.2d 829 is cited. This case, as well as the other cases referred to in the Answering Brief on pages 29 and 30, are not in point with respect to non-infringement of the accused barges. In effect, when the constructions of the patents involved in the cited cases are analyzed, it is apparent that all that was done in an attempt to avoid infringement was to make one piece of material which was “continuous” in the patent in suit into two pieces of material joined together but positioned in and performing the same function as the single piece of material of the patents.

In the present case, while three or possibly four separate cofferdam constructions are contiguous, they are separated by plates which form four void spaces instead of one and they have additional functions structurally over and above being merely cofferdams. This is not a case where there is merely a colorable attempt to avoid the claims of an issued patent. The patent in suit had not even issued prior to the time the accused barges were concluded and in service. Furthermore, the constructions of the accused barges provide different functions than the disclosure of the Pickrell patent and whether superior or inferior, nevertheless, are different for specific reasons.

Reference is made to the testimony of Pacific's practical expert, Spaulding, a well qualified naval expert and naval architect, at R.T. 356-357, wherein he states:

"Q Now, will you describe from a naval architect's standpoint the construction of the cofferdam structures of this barge, referring specifically to—well, you can refer to any part of the drawing you wish.

"A * * * The two augers are separated by a cofferdam, and this appears to be—there appears to be sufficient depth of hull under the augers to provide proper transverse strength, and there is adequate access to the cofferdam spaces.

"I note by the drawing that, rather than having one continuous cofferdam as is noted by the patent claim, that in transverse section the cofferdam is separated into three distinct spaces, each space hav-

ing been provided with its own access and its own venting.”

It is, therefore, abundantly clear that the cofferdam structure of the accused barges are not “continuous” in any sense of the word and that the lack of continuity provides actual structural differences performing different functions rather than connecting two pieces of material together instead of having one piece which is the thrust of the decision decided by opponent.

As has been pointed out before, the claims in issue of the Pickrell patent are all limited to “V-shape.” PATCO takes the position that to call the cofferdam structure a “W-shaped” cofferdam borders on the ridiculous (Answering Brief, page 31). This is a ridiculous statement, since it is obvious that Pacific’s cofferdams result in a W-shape. Mr. Glosten testified at R.T. 272-273 that within his own office during the designing process, the cofferdam was referred to as “a W-shaped space, and I have always thought of it that way.” The case referred to in the Answering Brief quotes the case of *Myers v. Beall Pipe and Tank Corporation*, (D.C. Ore. 1948) 90 F. Supp. 265, 79 USPQ 173, as follows:

“In attempting to avoid the claims of infringement, it is also argued that the form of the structure does not fall within the claims of the Myers patent.

It is fairly obvious that a great deal of effort has been gone to in order to change the form so that it would look different than the Myers patent, but imitation of essentials is the truest flattery and also points to the reality of infringement. Any equivalent of a reach with proper devices for attachment so that traction is transmitted to the frame and to the ground engaging elements, is sufficient to satisfy a finding of infringement. The attempt to differentiate the accused construction from those of the patent, because the means of attaching and supporting the reach are not identical, is made by subtly fallacious reasoning.” (90 F. Supp. at 272)

The present case clearly distinguishes from *Myers*, since as has been pointed out, the Pickrell patent had not issued when the accused barges were designed, constructed and placed into service, so obviously there could not have been a great deal of effort to change the form of the barges so that they would look different from the *Myers* patent. *Myers* also involves the doctrine of equivalents, since there was no file wrapper estoppel, which is not the situation here.

It has already been pointed out that the W-shaped cofferdam is materially different in utilization, characterization and function.

PATCO'S ARGUMENT RE FILE WRAPPER ESTOPPEL

The Brief on Cross-Appeal sets forth Pacific's position on file wrapper estoppel in detail. However, answering PATCO's arguments on pages 33-38 of the An-

swering Brief, it states on page 34 thereof as follows:

“* * * let it be clearly understood that Cross-Appellee has not sued on cancelled claims 1 and 2.”

Such a statement begs the question of file wrapper estoppel, since the law with respect thereto is in part based upon the wording of claims which have been cancelled during the prosecution of the patent application which results in the issuance of a patent.

PATCO, however, is finally completely candid in its basis for alleging that the accused barges infringe claims 1, 6, 8 and 11 of the patent, when it states in the Answering Brief at page 34 that:

“* * * It has, however, brought suit on Claims 1, 6, 8 and 11 of the patent and fully demonstrated that these claims are infringed by the accused barges *since they embrace the spirit and substance of the Pickrell invention* as defined therein.” (emphasis supplied)

As pointed out in *Nelson*, (page 9 of this brief) this is not a test of infringement of a patent with combination claims, such as the Pickrell patent. PATCO, in effect, admits that the claims in issue do not literally read upon the accused barges. Since they do not and since they are combination claims, there is no infringement. Certainly, Pacific *has* pointed out in detail where the file wrapper estoppel exists with respect to the claims sued upon.

On page 34 of the Answering Brief, the statement is made as follows:

“The mere fact that a patentee elects to cancel certain claims and continue the negotiations with the Patent Office for the procurement of other and different claims, does not bar such patentee from the right to enforce the claims obtained.”

The case of *Payne Furnace & Supply Co. v. Williams-Wallace Co.*, (C.C.A. 9 1941) 117 F.2d 823.

PATCO does not take issue with *Payne*, because in that case the rejected and cancelled claims were entirely different combinations than the claims sued upon. As stated in *Payne* at page 828, the rejected and cancelled claims included references to male and female fittings at the ends of the inner and outer tubes and do not include the feature of slidability of the inner pipe. The claims sued upon, however, which are reproduced in *Payne* at page 825, call for insulating material and an inner tube slidably located in the inside of the insulating material and do not include the male and female fittings. Obviously, as the Court stated,

“The rejected claims were for different combinations and as we understand it, any estoppel could extend no further than in the cancelled combinations.”

In the present case, however, the feature of the

single V-shaped continuous cofferdam, which is the only alleged feature of novelty by the inventor's own admission (R.T. 108) was present in the rejected and cancelled claims, although the word "V-shaped" was not used. In other words, the rejected and cancelled claims were for the same general combination as the claims in issue. As pointed out above, the claims, even though categorized as attempted by PATCO, must be read in the light of the specification, drawings, file wrapper, positions taken in Court and the prior art, and PATCO's argument falls by the wayside when all of these factors are taken into account. The case of *Bryan v. Garrett Oil Tools*, 245 F.2d 365, a Fifth Circuit case decided in 1957, cited at page 36 of the Answering Brief, is clearly distinguishable, wherein the Court found:

"* * * Moreover Bryan is not estopped from claiming broadly enough to include the Garrett valves since in pursuing his application in the Patent Office *he did not change the wording* of his claim or otherwise limit it, *but merely explained to the satisfaction of the examiner wherein the Bryan invention differed from the Otis one*—and the distinction is based on the inclusion of the *same features* that THE ACCUSED TOOLS ALSO HAVE. * * *" (Emphasis added) (245 F.2d at 369)

In *Bryan*, there was no change in the wording of the claim, but a mere explanation of the difference be-

tween the Bryan invention and the prior art in the attorney's argument in the Patent Office and the distinction was based on the *same features* that the accused tools had.

Pacific has answered either in this Brief or in the Brief on Cross-Appeal the statement made at pages 37 and 38 of the Answering Brief and the authorities cited therein.

PATCO'S ARGUMENT RE WILLFUL INFRINGEMENT

PATCO's argument re willful infringement has, for the most part, been covered in Pacific's Brief on Cross Appeal.

PATCO bases its argument on five points listed in its Answering Brief at pages 39 and 40. With respect to item (1), it is not necessary for one who is contemplating the development and construction of a barge, for example, to make a patent investigation in order to avoid a charge of willful infringement. It is apparent from the comments of all of Pacific's witnesses who are skilled in the art of designing barges that they would have considered the cofferdam obvious, would have had no difficulty in designing the same and expressed surprise that any patent could issue on such a structure. Therefore, item (1) should not be considered as a factor with respect to willful infringement.

As to item (2), the same remarks apply as to item (1).

As to item (3), this has been answered in the Brief on Appeal. Mr. Glosten would not have had time to take advantage of any information he might have obtained from Tidewater's barges or drawings.

With respect to item (4), barges on the Columbia River as shown by the prior art included single V-shaped dry cargo holds with liquid cargo space below them. Obviously, the overall designs of these large barges would not differ materially. The cofferdamming is obvious when required.

With respect to item (5), the fact that Pacific never contacted PATCO about the use of the accused barges is not an element of willful infringement. When one is sued for the infringement of a patent, he need not ask for a license, if he is of the honest opinion that the patent is invalid and there is no infringement, in order to avoid the charge of willful infringement. Such is the situation here.

With the exception of item (3) relating to Mr. Glosten's contacts re PATCO's barges, the other items are directed to what Pacific did *not* do, item (4), of course, being clearly irrelevant. As pointed out in the cases cited in the Brief on Cross-Appeal, it is necessary for PATCO to show that what Pacific *did* do was done

in bad faith, and there is not one iota of evidence with respect thereto.

It is therefore submitted that there can be no willful infringement involved, and this is particularly true since the District Court found the patent in suit to be invalid for obviousness under 35 U.S.C., Section 103.

CONCLUSION

The evidence before the District Court does not support its findings with respect to alleged infringement by Pacific or any knowing, willful and wanton character of such alleged infringement. PATCO has failed to sustain its burden of proving alleged infringement and has failed completely in establishing that there was knowing, willful and wanton infringement on the part of Pacific.

Respectfully submitted,

JOHN GORDON GEARIN

W. MELVILLE VAN SCIVER

JOHN GORDON GEARIN
By _____

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

JOHN GORDON GEARIN

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

**On Petition for Enforcement of an Order of
the National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

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OCT 10 1966

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AUTHORITIES CITED

Cases:

<i>A. M. Andrews Co. of Oregon v. N.L.R.B.</i> , 236 F. 2d 44 (C.A. 9)	12
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 21109

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

**On Petition for Enforcement of an Order of
the National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

STATEMENT OF THE CASE

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order issued against respondent on November 15, 1965, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*). The Board's Decision and Order (R. 50-54)¹ is reported at 151

¹ References to the pleadings, decision and order of the Board and other papers reproduced as "Volume I, Pleadings,"

NLRB 752, and its Supplemental Decision and Order (R. 69-70) is reported at 155 NLRB No. 76.² This Court has jurisdiction under Section 10(e) of the Act, the unfair labor practices having occurred in Wenatchee, Washington.

I. The Board's Findings of Fact and Conclusions of Law

Briefly, the Board found that respondent violated Section 8(a)(5) and (1) of the Act by refusing, on and after July 26, 1963, to bargain with the authorized representative of its employees. The Board further found that respondent independently violated Section 8(a)(1) of the Act by threatening an employee concerning the adverse consequences of unionization. Furthermore, the Board, rejecting respondent's contention to the contrary, determined that respondent is engaged in commerce, and that the purposes of the Act will be effectuated by asserting jurisdiction over respondent's operations. The facts on

are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." "G.C. Exh.," refers to exhibits of the General Counsel. Wherever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

² In its original Decision and Order the Board rejected the Trial Examiner's original report which recommended dismissal of the complaint for jurisdictional reasons. In overruling the Examiner, the Board asserted jurisdiction, and remanded the case for preparation and issuance of a supplemental report, which the Board thereafter affirmed in its Supplemental Decision and Order. The issue concerning the Board's jurisdiction is discussed *infra*.

which the Board's conclusions are based are summarized below.

A. The Board's jurisdiction: the nature of respondent's business

Respondent operates a large drug store in Wenatchee, Washington, and, at the time material herein, employed 7 sales clerks, 2 pharmacists, 10 to 12 lunch counter employees and 1 office worker (R. 56; Tr. 74). The sales personnel perform various shelf stocking, sales, and cashier functions (R. 56; Tr. 79-80). The Union³ conducted organizational activity among the sales personnel in July 1963 (R. 56; Tr. 66).

Respondent is a Washington corporation. Clarence Olberg and his wife, Irene Olberg, president and vice president respectively, jointly own 98 percent of the stock of the corporation. The remainder of the stock is owned by Ralph Purvis, the corporation's secretary-treasurer, and these three individuals comprise the board of directors (R. 50-51; Tr. 13-15). Gail Hayes is the manager of respondent (R. 51; Tr. 35-36). Respondent's gross sales for 1963 were \$424,000 and its purchases from outside the State of Washington exceeded \$30,000 (R. 50; Tr. 55-57).

Respondent is one store in a chain of five retail drug stores which Clarence Olberg and his associates operate in the State of Washington. The other four stores in the chain are owned by Thrifty Investment

³ Retail Store Employees Local 631, Retail Clerks International Association, AFL-CIO.

Co., Inc., d/b/a Thrifty Drugs,⁴ and are located at Pasco, Kenewick, Richland, and Quincy, Washington (R. 51; Tr. 30-33). The officers of Thrifty Investment are Clarence Olberg, president, Gail Hayes, vice president and Ralph Purvis, secretary-treasurer.⁵ These three individuals also constitute the board of directors (R. 51; Tr. 14-15). Olberg and Hayes each own 50 percent of the stock of Thrifty Investment. The annual gross sales of Thrifty Investment exceed \$500,000 (R. 51; Tr. 57).

Clarence Olberg, in addition to being president of respondent and Thrifty Investment, is also president of Olberg Thrifty Drugs of Bremerton, Inc., d/b/a Thrifty Drug Stores of Washington,⁶ which is a purchasing and payroll service organization located in Seattle, Washington (R. 51; Tr. 23, 26). President Clarence Olberg and Vice President Irene Olberg own 98 percent of the stock in this corporation. Ralph Purvis is secretary and Willis Rottman is treasurer. The board of directors consists of the Olbergs and Rottman (R. 51; Tr. 26).

The manager of the Wenatchee store, Gail Hayes, is compensated by salary and commission (R. 51; Tr. 35-36). Hayes has full authority to hire and discharge employees, set wage rates, and determine vacation periods and holidays (R. 51; Tr. 38). Hayes also prices the merchandise and arranges for advertising,

⁴ Herein referred to as Thrifty Investment.

⁵ As indicated above, these are the same individuals who comprise the management of respondent.

⁶ Herein referred to as Olberg Thrifty Drugs.

and has authority to determine labor policies, except when a "controversy" arises, in which case the situation is referred to Clarence Olberg for decision. This same managerial system is used in the four Thrifty Investment stores (R. 51; Tr. 38-39, 47-48). However, Hayes, who, as noted, owns 50 percent of the stock of Thrifty Investment, visits its four stores from time to time. His most frequent visits—about 10 a year—are to the store in Quincy, which is the closest to Wenatchee, about 30 miles distant (R. 52; Tr. 136-137). There is also interchange of employees between the Wenatchee and Quincy stores. Sales employees are exchanged, for example, at times of taking inventory, and pharmacists are exchanged during periods of vacation and illness. At other times employees are assigned interchangeably between the two stores "to give them more experience in other stores and to broaden their viewpoints" (R. 52; Tr. 48-50).

Olberg Thrifty Drugs collects advertising and purchasing data and handles payroll for the Wenatchee store, for the four Thrifty Investment stores, and for about 30 other retail food and drug stores (R. 52; Tr. 23-24, 40-41). Each store pays Olberg Thrifty Drugs a fee for services rendered (R. 52; Tr. 42). Respondent reimburses Olberg Thrifty Drugs for the amount of its payroll. Payroll checks are drawn on the account of Olberg Thrifty Drugs, but the Wenatchee store is designated at the bottom of the check (G.C. Exh. 10). Certain correspondence on behalf of respondent, including letters concerning the instant proceeding, originates in the office of Olberg Thrifty Drugs. The letterhead used carries the name "Thrif-

ty Drug Stores of Washington” and lists among others the Wenatchee, Pasco, Kenewick, Richland and Quincy stores in such a manner as to indicate that they are part of a single chain (R. 52; Tr. 22; G.C. Exhs. 9, 11).

On the foregoing facts, the Board found that respondent and Thrifty Investment constitute a “single employer.” The Board further found that since the total gross revenue of the integrated enterprise exceeds \$500,000 a year, and as respondent makes purchases of materials directly from outside the State valued in excess of \$30,000, respondent is engaged in commerce and the purposes of the Act will be effectuated by asserting jurisdiction over respondent.

B. The unfair labor practices

On July 24, 1963, the Union possessed signed authorization cards from 5 of the 7 sales employees in respondent’s store (R. 57; G.C. Exh. 13-A, 13-B). On that date, Paul Rickman, executive officer of the Union, wrote to respondent’s manager, Gail Hayes, stating that the Union represented a majority of respondent’s employees, and indicating that the Union wished to arrange for collective bargaining with respondent. Rickman requested to be advised whether Hayes had authority to represent respondent, and in the event he did not, asked who was responsible for this phase of the Company’s operation (R. 56-57; G.C. Exh. 12). Enclosed with the Union’s letter were photostatic copies of authorization cards signed by 5 of respondent’s sales employees (G.C. Exh. 13-A, 13-B).

Receiving no answer to his letter, Union Agent Rickman wrote again to Manager Hayes on July 30, 1963, to complain about reports reaching him of "coercion, intimidation, and other acts by management to discourage Union membership" (R. 57; G.C. Exh. 14). Rickman again indicated the Union's desire to enter into negotiations with respondent (R. 59; G.C. Exh. 14). The union agent wrote again the following day, July 31, to say that he had heard that Manager Hayes was going on vacation as of August 1, and that the Union wanted an answer to its letter of July 24, and further, to commence bargaining (R. 57-58; G.C. Exh. 15). Respondent never replied to any of the Union's letters (R. 58).

About a week after receiving the first letter from the Union, Manager Hayes engaged employee Joanne Field in conversation and told her that if the Union came into the store "he would have to cut back his help" because he could not afford the wages the Union "would require." Hayes also told Field that he would have to lay her off, as well as employees Ollie Waite and Lena Hoggart, all three of whom had signed union authorization cards (R. 58; Tr. 85, G.C. Exh. 13-A, 13-B).⁷ Field, who was pregnant, had previously been told by Hayes that she could continue

⁷ On the day he received the Union's first letter and the photostatic copies of the cards, Manager Hayes had summoned Field to his office, showed her the copies of the card, and told her that "... we would all be sorry that we joined the Union, that they didn't follow through on their promises" (R. 58; Tr. 84-86).

working as long as she was able to handle her job (R. 58; Tr. 86).

Upon the foregoing facts the Board found, in agreement with the Trial Examiner, that respondent violated Section 8(a)(5) and (1) of the Act by refusing on and after July 26, 1963, the approximate date of receipt of the Union's letter, to bargain with the Union as the exclusive representative of employees in an appropriate unit (R. 59). The Board further found that, by Manager Hayes' statement to Field that if the Union came into the store, he would terminate three employees including herself, respondent independently violated Section 8(a)(1) of the Act (R. 60).

II. The Board's Order

The Board's order requires respondent to cease and desist from refusing to recognize and bargain with the Union, from threatening employees with economic reprisal if they select a union, and from in any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

Affirmatively, respondent is required to bargain with the Union as the exclusive representative of the employees in an appropriate unit, and to post the usual notice (R. 62-63).⁸

⁸ Since respondent did not except to the Trial Examiner's finding that it violated Section 8(a)(5) and (1) of the Act by failing to bargain collectively with the Union, the Board adopted this finding *pro forma* (R. 70). In view of re-

ARGUMENT

I. The Board Properly Asserted Jurisdiction Over Respondent's Business

A. The existence of statutory jurisdiction is plain

As the record shows (*supra*, p. 3), respondent, in the course of conducting its retail drug business, makes annual out-of-state purchases in excess of \$30,000. The Board's statutory jurisdiction, therefore, is clear. The Act specifically states that the jurisdiction of the Board extends to any person ". . . engaging in any unfair labor practice . . . affecting commerce."⁹ Moreover, once it is determined, as here, that interstate commerce would be adversely affected if the business immediately involved were disrupted as the result of a labor dispute, the Act applies regardless of the volume of commerce affected, provided it is more than "*de minimis*." *N.L.R.B. v. Fainblatt*, 306 U.S. 601, 607. And see *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675, 684-685; *N.L.R.B. v. Reliance Fuel Oil Corp.*, 371

sondent's failure to except to the Trial Examiner's finding, it may not now, in view of Section 10(e) of the Act, contest the propriety of the finding or the corresponding remedial provision of the Board order. See *N.L.R.B. v. Cheney California Lumber Co.*, 327 U.S. 385; *Marshall Field and Co. v. N.L.R.B.*, 318 U.S. 253; *N.L.R.B. v. Ochoa Fertilizer*, 368 U.S. 318; *N.L.R.B. v. Giustina Bros. Lumber Co.*, 253 F. 2d 371, 374-375 (C.A. 9); *N.L.R.B. v. Noroian*, 193 F. 2d 172, 173 (C.A. 9).

⁹ Section 10(a), 29 U.S.C. Section 160(a), as those terms are defined by Section 2(6) and (7) of the Act, 29 U.S.C. Section 152(6) and (7).

U.S. 244; *N.L.R.B. v. Stoller*, 207 F. 2d 305, 307 (C.A. 9), cert. denied, 347 U.S. 919; *N.L.R.B. v. Townsend*, 185 F. 2d 378, 383 (C.A. 9), cert. denied, 341 U.S. 909. While no mathematical formula is available for determining exactly what is *de minimis*, it is well settled that “*de minimis* in the law has always been taken to mean trifles—matters of a few dollars of less.” *N.L.R.B. v. Suburban Lumber Co.*, 121 F. 2d 829, 832 (C.A. 3), cert. denied, 314 U.S. 693. Accord: *N.L.R.B. v. Inglewood Park Cemetery Assn.*, 355 F. 2d 448, 450-451 (C.A. 9), cert. denied, 384 U.S. 951, (\$3086.31 not *de minimis*); *N.L.R.B. v. Stoller*, *supra* (\$12,000 not *de minimis*); *N.L.R.B. v. Aurora City Lines, Inc.*, 299 F. 2d 229, 231 (C.A. 7) (\$2,000 not *de minimis*). As the cited cases indicate, there is no question but that the \$30,000 respondent expends on out-of-state purchases is not *de minimis*.

Although the business activities of respondent, without question, have a sufficient impact on interstate commerce to involve the statutory jurisdiction of the Board, respondent still argues in effect that the Board has violated its own self-imposed jurisdictional standards. As the Court recently noted, however, in *N.L.R.B. v. Carroll-Naslund Disposal, Inc.*, 359 F. 2d 779, 780, “It is settled law that the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board’s discretion; and it is not a matter for the courts, in the absence of extraordinary circumstances such as unjust discrimination.” Citing, *N.L.R.B. v. Townsend*, 185 F. 2d 378, 383 (C.A. 9); *N.L.R.B. v.*

Stoller, supra, 207 F. 2d at 307 (C.A. 9); *N.L.R.B. v. Jones*, 245 F. 2d 388, 391 (C.A. 9). Also see *N.L.R.B. v. Carpenters Local Union 2133*, 356 F. 2d 464, 465 (C.A. 9). As we show below, such extraordinary circumstances did not exist here, and the Board's exercise of its discretion was in all respects reasonable.

B. Respondent meets the Board's self-imposed jurisdictional standards

The Board, as a matter of administrative policy, has established certain jurisdictional standards, expressed in terms of annual dollar minimums, to determine under what conditions it will assert its jurisdiction. The function served by these self-imposed standards is to conserve the Board's resources so that it may "concentrate its energies" on those cases having a significant impact on interstate commerce. *N.L.R.B. v. Jones, supra*, 245 F. 2d at 391 (C.A. 9); *N.L.R.B. v. F. M. Reeves & Sons, Inc.*, 273 F. 2d 710, 711 (C.A. 10), cert. denied, 366 U.S. 914.¹⁰ Accordingly, the Board has held that it will assert jurisdiction over all retail enterprises which do a gross volume of business of at least \$500,000 per annum. *Carolina Supplies & Cement Co.*, 122 NLRB 88, 89. The Board applies this standard to the total operations of an employer

¹⁰ The Board's discretionary standards received Congressional approval in 1959 under Section 14(c)(1) of the Act, wherein Congress provided that the Board might continue to decline jurisdiction over any labor dispute within its statutory jurisdiction, provided that it does not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the jurisdictional standards prevailing on August 1, 1959.

including all of the plants and locations where he conducts operations, even though only one facility is directly involved in the Board proceeding. *Ibid.*; *Simmons Mailing Service*, 122 NLRB 81, 84.

The Board, in asserting jurisdiction in this case, concluded that respondent and Thrifty Investment comprised a single integrated enterprise and thus should be treated as a "single employer" for jurisdictional purposes (R. 53). This conclusion accords with the Board's judicially approved practice of treating separately organized enterprises as one employer for jurisdictional purposes where it is found that their operations, although nominally separate, are highly integrated with respect to ownership and operation. See, e.g., *Sakrete of Northern California v. N.L.R.B.*, 332 F. 2d 902, 905 (C.A. 9), cert. denied, 379 U.S. 961; *A. M. Andrews Co. of Oregon v. N.L.R.B.*, 236 F. 2d 44, 45 (C.A. 9).

As the record in this case shows, respondent and Thrifty Investment have interlocking ownership and common management. Clarence Olberg is president of both corporations and Ralph Purvis is secretary-treasurer in both instances. Olberg's wife is vice president of respondent, while the vice president of Thrifty Investment is Gail Hayes, who is the manager of respondent. Advertising, purchasing and payroll services for both corporations are performed by a third corporation, Olberg Thrifty Drugs, which Clarence Olberg also heads, and in which his wife is vice president and Ralph Purvis is secretary.

Clarence Olberg plays an active role in the management of respondent, as he does in his other enterprises, and Gail Hayes performs certain managerial

functions with respect to the four stores owned by Thrifty Investment. Various other categories of employees are likewise interchanged among the five stores in the group. Finally, correspondence on behalf of all the stores that Clarence Olberg controls is conducted by him on stationery bearing the letterhead "Thrifty Drug Stores of Washington." The stores are listed on the letterhead, as the Board noted, "in such a manner as to indicate that they are part of a single chain" (R. 52).

As this Court said in *Sakrete of Northern California, Inc. v. N.L.R.B.*, *supra*, 332 F. 2d at 907, "If there is overall control of critical matters at the policy level, the fact that there are variances in local management decisions will not defeat application of the 'single employer' principle." In short, the Board's determination to assert jurisdiction over respondent's operations fully comports with its long standing policy with respect to integrated enterprises. We submit, therefore, that the Board did not abuse its discretion in asserting jurisdiction over respondent. Since the combined sales of respondent and the four Thrifty Investment stores admittedly exceed \$500,000, the Board's self-imposed standard for retail operations is clearly met.

II. Substantial Evidence on the Record as a Whole Supports the Board's finding That Respondent Violated Section 8(a)(1) of the Act by Threatening an Employee

As shown above, shortly after the Union secured authorization cards from 5 of the 7 employees in the unit and sent copies of the cards, along with a request

to bargain, to respondent, Manager Hayes told employee Field, who had signed a card, that "he would have to cut back his help" if the Union came into the store because he could not afford the wages that the Union "would require." Hayes then stated that the employees who would be laid off were Waite and Hoggart, both of whom had also signed authorization cards, as well as Field (R. 58; Tr. 85).

The Board found that this threat was made in violation of Section 8(a)(1) of the Act. It is well recognized that statements of this type, made during a union organizing campaign have a coercive effect on employees and inhibit them in the free exercise of their statutory rights. The Board's finding of unlawfulness, accordingly, was in all respects proper. *Carpinteria Lemon Ass'n. v. N.L.R.B.*, 240 F. 2d 554, 558 (C.A. 9); *N.L.R.B. v. V. C. Britton Co.*, 352 F. 2d 797, 798 (C.A. 9); *N.L.R.B. v. Kit Mfg. Co.*, 292 F. 2d 686, 688 (C.A. 9).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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October 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or trans-

acts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

No. 21,109

IN THE

**United States Court of Appeals
For the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR WENATCHEE THRIFTY DRUGS, INC.

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United States Court of Appeals
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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

BRIEF FOR WENATCHEE THRIFTY DRUGS, INC.

STATEMENT OF THE CASE

This case is before the Court on petition of the National Labor Relations Board for enforcement of an order of the Board directed to respondent on November 15, 1965. Said order was issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.).

A hearing before a Trial Examiner on a complaint issued by petitioner was held and the Decision of the Trial Examiner issued dismissing the complaint against respondent for lack of jurisdiction. Exceptions to the Decision were filed and the Decision and Order of the Board reversing the Trial Examiner is reported at 151 NLRB 752. The Supplemental Decision and Order is reported at 155 NLRB 76.

This Court has jurisdiction under Section 10(e) of the Act for review of the proceedings before the

Board to determine if the findings of the Board are supported by substantial evidence.

The findings to be reviewed are to the questions: (1) Does the Board have jurisdiction over respondent, and if so, (2) Has respondent engaged in unfair labor practices for which enforcement of the Board's order should be decreed by this Court.

The scope of review in determining if substantial evidence supports the findings is stated in *Universal Camera Corporation, Petitioner, v. National Labor Relations Board*, 340 U.S. 474, 95 L. ed. 456.

STATEMENT OF FACTS

A. Jurisdiction

The facts upon which the Board based its conclusions in support of finding the Board had jurisdiction are summarized as follows:

(a) Respondent adopts the facts set forth in paragraphs 1 and 2 of petitioner's brief under subheading A. The Board's jurisdiction: page 3.

(b) Respondent is a separate corporate entity operating its one store in Wenatchee, Washington. (Tr. 13.)

(c) Thrifty Investment Co., Inc. is a separate corporate entity and operates four retail drug stores in the State of Washington located in Pasco, Kennewick, Richland and Quincy. (Tr. 30-33.) The stock of Thrifty Investment Co., Inc. is held 50% by Clarence Olberg and 50% by Gail Hayes. Olberg is presi-

dent, Hayes is vice-president and Ralph Purvis is secretary-treasurer of Thrifty Investment Co., Inc. The annual gross sales of Thrifty Investment Co., Inc. exceed \$500,000.00. (Tr. 14-15, 57.)

(d) The manager of Wenatchee Thrifty Drugs is on a full time basis with sole discretion to hire and discharge employees, set wage rates, determine vacation periods, price merchandise, arrange for advertising, and with some discretion in stocking the brand of products. (Tr. 35-38.)

(e) The stores owned by Thrifty Investment Co., Inc., also have independent managers with independent authority on the matters mentioned above. (Tr. 38-39.)

(f) Clarence Olberg is drawn into labor policy only when a controversy arises. (Tr. 39.)

(g) On occasion personnel of the Wenatchee Thrifty Drugs have assisted in taking inventory in the Quincy Store of Thrifty Investment. Further, pharmacists have been exchanged on occasion during vacation periods, in cases of illness and to get more experience and to broaden their viewpoints. (Tr. 48-50.)

(h) Certain correspondence on behalf of Wenatchee Thrifty Drugs originates in a Seattle office. (Tr. 22.)

(i) Certain other services, apparently provided on a contract basis, are provided both Thrifty Investment Co., Inc., and Wenatchee Thrifty Drugs, by another organization. (Tr. 40-42.)

B. Unfair Labor Practices

Respondent adopts the facts set forth in petitioner's brief under Subheading B. The Unfair Labor Practices, except for the addition of the following: That Hayes indicated Joanne Field would have to be laid off because of her pregnancy. (Tr. 85.)

**THE BOARD'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW****A. Jurisdiction**

Based upon the above-stated facts the Board found:

"Under all the foregoing circumstances, we find contrary to the trial examiner, that the respondent and Thrifty Investment constitute a 'single employer' for jurisdictional purposes. As the total gross revenue of the Respondent and Thrifty Investment exceeds \$500,000.00 a year, and as the Respondent made purchases of materials directly from outside the State valued in excess of \$30,000.00 last year, we find that the Respondent is engaged in commerce and that it will effect the purposes of the Act to assert jurisdiction herein."

B. Unfair Labor Practices

The Board's conclusion of law pertaining to violation of Section 8(a)(1) is:

"By threatening employees with economic reprisals if the Union were selected to represent them, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act."

ARGUMENT

A. THE FACTS DO NOT SUPPORT THE CONCLUSIONS UPON WHICH THE BOARD BASES ITS DETERMINATION OF SINGLE EMPLOYER AND FINDING OF JURISDICTION.

The Petition to the Court of Appeals is under the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.) Sec. 10(e) which provides:

“ . . . The findings of the Board with respect to questions of fact if supported by *substantial evidence* on the record considered as a whole shall be conclusive . . . ”. (Emphasis added.)

Relating the facts of this case to the conclusions of the Board it is submitted such conclusions are unsupported by the facts. Several vital and basic matters should be considered:

1. The Board makes reference to Olberg Thrifty Drugs and certain services which they apparently provide. Such reference by the Board or testimony pertaining thereto is immaterial on the issues before this Court. There is no finding of integration with Olberg Thrifty Drugs. Integration, common management or common policy of Wenatchee Thrifty Drugs and Thrifty Investment cannot be predicated on such services provided by a separate entity.

2. Aside from an exchange of employees by Wenatchee Thrifty Drugs and the Quincy Store of Thrifty Investment Co., Inc. on a very restricted basis, there is no evidence of interrelation of operation. There is absolutely no evidence of common management policies or centralized control of labor relations or pol-

icies. There is no evidence that management policies of all five stores are controlled or uniform. There is testimony they are not. There is no evidence of active managerial participation by the common stockholder in either corporation nor any evidence of common managerial policies.

3. There is no evidence of centralized labor relation policies. The only evidence presented is that the manager of Wenatchee Thrifty Drugs and the manager of Thrifty Investment Co., Inc., consult with the President of the respective corporations if a controversy arises. It is not unusual for management of an entity to consult with a corporate officer of that entity. The record is completely void of any showing of common labor relation policy and in fact is completely void of showing of any labor relation policy at all.

The record is absolutely lacking in showing either management policy or labor relations policy of Thrifty Investment Co., Inc., or that such policies are common to and arise from centralized management with Wenatchee Thrifty Drugs, Inc.

4. There is no showing of any common policy and no showing that the common stockholder formulated or directed any common policy. To the contrary, the only evidence is that the managerial head of each store formulated his own individual policy.

5. The factors the Board considers in determining whether two entities constitute a single employer are those of integration, centralized control of labor relations, centralized management and common owner-

ship. When such factors exist, they tend to show "operational integration", and upon reaching such determination, the gross sales of the integrated entities are considered in determining if jurisdictional standards are met.

It is submitted that none of these factors are established in this case except a degree of common ownership.

The jurisdictional standards have not and cannot be met except on a "single employer" concept, which, of course, cannot be sustained on the facts of this case.

B. THE FACTS DO NOT AS A MATTER OF LAW SUPPORT THE BOARD'S DETERMINATION OF "SINGLE EMPLOYER" AND FINDING OF JURISDICTION.

The finding of fact of jurisdiction by the Board is contained in its Decision and Order Remanding Case to Trial Examiner 151 NLRB 84. The jurisdictional finding of the Trial Examiner in his Supplemental Decision and Order 155 NLRB 84 merely adopts said jurisdictional finding and cites said Decision as the basis of said finding. This is clearly indicated by reason of the original decision of the Trial Examiner dated September 10, 1964, in which the findings did not confer jurisdiction upon the Board.

The exception of the charging party to the original Trial Examiner's Decision dismissing the complaint for lack of jurisdiction was as follows:

1. "To the failure to find common control and Labor Policy of Wenatchee Thrifty Drugs, Inc., and

Thrifty Investment Company, Inc., d/b/a Thrifty Drugs.”

The original decision of the Trial Examiner was clearly excepted to on the basis of failure to find an integrated operation upon which to meet the jurisdictional standards of the Board.

Thus, it becomes imperative to determine the basis of the Board’s reversal and finding of jurisdiction in the Decision 151 NLRB 84.

On page one of the Decision, the Board states: “The Respondent, Wenatchee Thrifty Drugs, Inc., is a Washington corporation which operates one retail drug store in Wenatchee, Washington. Its gross volume of sales in 1963 was \$424,000. For the same period, its out-of-state purchases were valued at approximately \$30,000.”

At this point nor at any other point in their Decision is any reference made to those facts being sufficient to sustain a jurisdictional finding, nor is there the slightest indication that jurisdiction is based thereon or that the Board would assert jurisdiction on said facts.

The balance of the Decision is directed to the issue of whether Wenatchee Thrifty Drugs, Inc., and Thrifty Investment constituted a “single employer” whose combined gross sales would be sufficient to meet the Board’s jurisdictional standards.

Further, the balance of the Decision consists primarily of factual recitals the Board apparently considered in arriving at their conclusion of a “single employer”.

The factors considered by the Board in treating separate concerns as a "single employer" are set out in the National Labor Relations Board Twenty First Annual Report, pp. 14-15, and are stated to be:

1. Interrelation of operations.
2. Centralized control of labor relations.
3. Common management.
4. Common ownership or financial control.

It is further stated therein:

"No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show 'operational integration', particularly centralized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control."

Petitioner cites as authority for the single employer concept, *Sakrete of Northern California v. N.L.R.B.*, 332 F. 2d 902, and *A. M. Andrews Co. of Oregon v. N.L.R.B.*, 236 F. 2d 44. These are readily distinguishable on the facts. In the *Sakrete* case all stock of both corporations was held by husband and wife, the conduct of business operations was substantially parallel, both sell the same products and use the same equipment, *Sakrete* controlled the sale of all products of both corporations, *Sakrete* retained the right to check the operations of employer, the principal stockholder presided at all meetings of employer and was the ultimate authority for both companies whose operating policies and procedures are almost identical,

the sole stockholder established all companies' policies regarding wages, hours and conditions of employment. He was responsible for sales, purchases of supplies and the hiring and firing of employees.

None of the above facts are present in the instant case except common ownership of a much lesser degree.

Nor does the *A. M. Andrews Co. of Oregon v. N.L.R.B.*, supra, support a "single employer" finding. The facts in that case showed a complete active common management and complete financial dependence and control. Any such evidence is lacking in the present case.

Applying the evidence before the Court on these factors as such is set forth under the statement of facts, it is apparent these tests, except for limited common ownership, are not established and the facts will not sustain a finding of a single employer.

There was a failure to establish jurisdiction because of insufficient facts establishing a single employer under the following cases: *Electronic Circuits, Inc.*, and *United Automobile Workers, Amalgamated Local No. 286, AFL-CIO*, 115 NLRB 940, under facts showing an 80% stock ownership, interlocking boards of directors and services performed for the parent company; *American Furniture Co., Inc.*, 116 N.L.R.B. 206, in which the facts showed a majority of stock of each of the three employers owned by members of one family, interlocking directorate, the companies purchased from each other, and from an

association to which all three employers belong. The record also reflected each employer was a separate legal entity, had its own stores, warehouses, offices, payroll division, financial organization, and filed separate tax returns. Each has a general manager who is in charge of and formulates the operational policies for his store. There are no joint meetings of directors or officers to discuss business policies, no interchange of employees and each does his own hiring and firing and determines its questions of policy. The Board concluded each employer operates independently and is not an integrated enterprise; *The Woodstock Manufacturing Co.*, 116 N.L.R.B. 389, in which common ownership, proximity and bookkeeping was found, but each had separate management, hiring, firing and policies; *Park Plaza Amusement Co.*, 124 N.L.R.B. 53, under facts similar to those in this case, a degree of common ownership and some services provided to the other corporation.

Potential common control is not sufficient to constitute two corporations one integrated employer, *J. G. Roy & Sons v. N.L.R.B.*, 251 F. 2d 771 (C.A. 1). Common purchasing and fiscal service falls short of common management, operations, centralized control and common labor policy. *Worcester Stamped Metal Co.*, 146 N.L.R.B. 1683.

Common management, integration of operations and centralized control of labor relations must be established. *Miami Pressmen's Local No. 46 v. N.L.R.B.*, 322 F. 2d 405 (C.A.D.C.); *N.L.R.B. v. Deerfield*

Screw Machine Products Co., 329 F. 2d 558 (C.A. 6)

**C. THE FACTS DO NOT SUPPORT A FINDING OF A
VIOLATION OF SECTION 8(a)(1).**

The alleged violation of Section 8(a)(1) of the Act concerned a statement of manager Hayes to employee Field,

“... if the union came in the store he would have to cut back his help because he couldn't afford to pay the wages that they would require and he specified three people he would have to lay off and one was Ollie Waite, one was Lena Hoggart, and myself, because of my pregnancy.” (Tr. 85.)

Factually the pregnant employee Field has been told by manager Hayes that she could work “... as long as I was able to do my work ...” (Tr. 86) and she did in fact work into her seventh month of pregnancy (Tr. 86). Her employment terminated in November during the annual pre-Christmas season heavy sales period.

In a similar manner, Waite and Hoggart, were part-time employees who had been laid off for the months of January and to June in 1963 (Tr. 96) due to slow business. The record discloses they were in like manner laid off in January 1964. (Tr. 88, 108.)

The Trial Examiner held that this one statement of manager Hayes was an “isolated incident”. We submit that upon the failure of the Board to find any discharge had been made because of discrimina-

tion that the statement of manager Hayes will not support a finding of a violation of Section 8(a)(1).

CONCLUSION

The findings of the Board that Wenatchee Thrifty Drugs, Inc., and Thrifty Investment Co., Inc., is a "single employer" and that the gross sales under the "single employer" theory are sufficient to confer jurisdiction is not supported by substantial evidence and it is respectfully requested the Order of the Board be declared void as being without jurisdiction.

Dated, Wenatchee, Washington,
November 9, 1966.

Respectfully submitted,
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By JON H. PHELPS,
Attorneys for Respondent
Wenatchee Thrifty Drugs, Inc.

CERTIFICATE OF COUNSEL

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

ENGST, PHELPS AND YOUNG,
By JON H. PHELPS,
Attorneys for Respondent
Wenatchee Thrifty Drugs, Inc.

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

REPLY BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD

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FILED

DEC 5 1966

WM. B. LUCK, CLERK

FEB 15 1967



**In the United States Court of Appeals
for the Ninth Circuit**

No. 21109

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**REPLY BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD**

Respondent, in its brief, does not dispute the Board's statutory jurisdiction over its retail drug business. For reasons pointed out in our opening brief, this virtually eliminates the need for further judicial inquiry into the issue of jurisdiction. As this Court has acknowledged repeatedly, once it is established that the Board has acted within its constitutional and statutory power, "it is not for the courts to say when that power should be exercised." *N.L.R.B. v. Townsend*, 185 F. 2d 378, 383 (C.A. 9),

cert. denied, 341 U.S. 909; and see additional cases cited at pp. 9-11 of the Board's opening brief.

Notwithstanding its failure to contest the Board's statutory jurisdiction, respondent, in its brief (pp. 7-12), proceeds with an effort to show that the Board has abused its discretion in asserting jurisdiction in this case. Respondent's general line of argument, we believe, has been adequately dealt with in the Board's opening brief. We wish here merely to comment on the cases principally relied on by respondent. Each of the cases to which respondent refers is factually distinguishable from the one at bar, and in no instance is any circumstance revealed which would provide a basis for the conclusion that the Board has improperly exercised its discretion by asserting jurisdiction in the instant case.

Electronic Circuits, Inc., 115 NLRB 940, relied on by respondent (br. p. 10) is distinguishable from the case at bar, in that there were compelling factors in that case pointing to the separateness of the enterprises. The employer's operations and policies were under the exclusive direction and control of its president, rather than of the Richardson Company, which concededly owned a majority of the employer's stock. Further, the employer's president was not affiliated with the Richardson firm, as such; there was no exchange of personnel between the two firms; and the services performed by the employer for Richardson comprised only a small portion of the employer's business. Further, the services provided by the employer for Richardson were performed in the same manner for several other companies.

In *American Furniture Co., Inc.*, 116 NLRB 1496, the indicator of an integrated enterprise was common ownership, there consisting of majority ownership of three firms by one family. However, there was no interchange of employees, and the operational policies for each store were independently formulated by the three individual general managers. The Board concluded in that case that there was insufficient evidence that the three separate corporate entities constituted "a single integrated enterprise with centralized management and central control over labor relations policies." 116 NLRB at 497.

Woodstock Manufacturing Co., 116 NLRB 389, unlike the case at bar, was a proceeding where the issue was the appropriateness of a single bargaining unit. In holding that the employees of the two companies involved did not constitute a single appropriate unit, the Board relied on the fact that there was no interchange of employees, and that the firms had different presidents, each of whom had complete freedom in formulating policy and running his plant.

In *Park Plaza Amusement Co.*, 124 NLRB 428, as in the present case, two companies had the same president and certain officers in common. There was no employee interchange, however, and no common labor policy or benefits. Further, the employer's manager was completely free from control by the other company, and unlike the instant case, he was free to determine all of his own labor policies.

Respondent's reliance (br. p. 11) on *J. G. Roy & Sons v. N.L.R.B.*, 251 F. 2d 771 (C.A. 1), and *Miami*

Newspaper Pressmen's Local No. 46 v. N.L.R.B., 322 F. 2d 405 (C.A. D.C.), is misplaced. Unlike the case at bar, those cases involved alleged secondary boycott activity, and the question before the court in each instance was whether a particular employer was a "neutral," and thus an innocent third party in a labor dispute between a union and another company, or whether the two companies fell within the Board's "ally" doctrine, thereby taking the union's activity outside the proscription of the Act. Aside from the fact that those cases arose under a different provision of the Act than the one involved here, to the extent that they are analogous, we submit that they are distinguishable from the one before the Court. Each of those cases presented situations where, despite common ownership of two firms, labor relations policies were independently formulated. This is in sharp contrast to the instant case, where, as respondent concedes, Clarence Olberg, the president and a principal owner of Thrifty Investment, is drawn into respondent's labor policy on any occasion "when a controversy arises" (Resp. br. p. 3). Moreover, in neither of the two foregoing cases relied on by respondent was there the degree of employee interchange that is present here. In the *Roy* case there was no transfer of personnel from one firm to the other (251 F. 2d at 773), and in the *Miami Pressmen's* case of a total of 2500 employees, only two individuals were shown to have worked for both companies (322 F. 2d at 407). In the case at bar, on the other hand, the record shows that there was frequent interchange of employ-

ees among the several stores in the chain. (See p. 5 of Board's opening brief.)

CONCLUSION

For the reasons stated here and in our main brief, we respectfully submit that a decree should issue enforcing the Board's order in full.

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December 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
Assistant General Counsel
National Labor Relations Board

No. 21121

IN THE
**United States Court of Appeals
For the Ninth Circuit**

RAYONIER INCORPORATED,

Appellant,

v.

F. ARNOLD POLSON,

Appellee.

OCT 13 1965
WM. B. LUCK, CLERK

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 21121

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered by the Honorable George H. Boldt sitting without a jury, in favor of appellee. The jurisdiction of the District Court was based upon diversity of citizenship under 28 U.S.C. 1332. The jurisdictional allegations appear in Paragraph I of the Amended Complaint (R. 99) and under the heading "Jurisdiction" in the Pretrial Order. (R. 131)

The jurisdiction of the Court of Appeals is based upon 28 U.S.C. 1291. Judgment for the appellee was entered May 9, 1966 (R. 368-9) and Notice of Appeal was given by the appellant on June 7, 1966. (R. 370)

STATEMENT OF THE CASE

A. Background

This Lawsuit

In 1959 Rayonier entered into two contracts with Nina Bumgarner, a Quinault Indian, whereby she agreed to sell and Rayonier agreed to cut, remove and pay for her undivided one-half interest in the merchantable timber on the two Bumgarner Allotments. (Pl. Ex. 13 and 14)

In 1960 defendant Rayonier entered into a similar contract with Cleveland Jackson, who was managing partner of a joint venture composed of himself and plaintiff F. Arnold Polson, with respect to the other one-half interest in the timber on the two Allotments. (Pl. Ex. 15)

During 1961 Rayonier cut, removed and paid for approximately 3,230,000 feet, board measure, of timber from the Bumgarner Allotments. (R. 140) On August 21, 1962, Polson, as surviving joint venturer, commenced this lawsuit against Rayonier contending that the Rayonier-Jackson contract was unauthorized and seeking \$105,000 in treble damages for timber trespass under the provisions of R.C.W. 64.12.030. (R. 1-5) Prior to trial the plaintiff amended his complaint to allege as an alternative cause of action a claim for treble damages for waste under the provisions of R.C.W. 64.12.020. (R. 102-3)

On May 7, 1966, Judge Boldt entered a judgment in favor of plaintiff for \$69,000 treble damages for timber trespass, together with interest on single damages (\$23,000) from the date of trespass. Against this amount the Court allowed a set-off of the amount that had been

paid by Rayonier pursuant to the contract to the Estate of Cleveland Jackson. (R. 368) The court further held that in the event that upon review it should be determined that Rayonier had not committed a trespass, then he would find, in the alternative, that it had committed waste. (R. 361)

The Bumgarner Allotments

Under Quinault Allotments Nos. 1678¹ and 1679² certain land and timber was allotted respectively to Jean Irene Bumgarner and Shirley Blanche Bumgarner, Quinault Indians. The allotments were primarily forest lands and their most valuable and best use was for growing timber and harvesting logs and other forest products. (R. 140)

Shirley and Jean Bumgarner died in their childhood in the 1930's and upon their deaths, their mother, Nina Bumgarner, a Quinault Indian, inherited an undivided one-half interest in each allotment and their father, Wallace Bumgarner, a white man, inherited the other undivided one-half interest in each allotment. Fee patents to undivided one-half interests in each allotment were issued in the name of Wallace Bumgarner. However, Nina Bumgarner's undivided one-half interest was held in trust for her by the United States of America pursuant to applicable federal laws and regulations promulgated thereunder. (R. 134)

1. W $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Section 15, Township 22 N., Range 11 W.W.M., Grays Harbor County, Washington.

2. E $\frac{1}{2}$ of the NE $\frac{1}{4}$ of Section 10, Township 22 N., Range 11 W.W.M., Grays Harbor County, Washington.

The Polson-Jackson Joint Venture

The plaintiff, F. Arnold Polson, is the surviving joint venturer of a joint venture between himself and Cleveland Jackson which was formed in approximately 1947 for the purpose of acquiring, selling, exchanging and disposing of timber and timberland in Western Washington, including the logging or contracting for the logging of any timber so acquired. (R. 133; Pl. Ex. 1; F.F. 3, R. 335) The terms and conditions of the Joint Venture are set forth in an agreement dated March 5, 1951. (R. 133; Pl. Ex. 1)³ During the period from 1947 until his death on November 7, 1960, Jackson was the manager of the Joint Venture and handled its affairs. (Def. Ex. A-45; F.F. 3, R. 335)

The Crane Creek Contract

Rayonier was the successful bidder at public auction on the Crane Creek Contract (Pl. Ex. 4), which contract, when consummated, was dated June 18, 1952, and was between the Superintendent, Western Washington Indian Agency (hereinafter referred to as the "Superintendent") and Rayonier. (R. 137)⁴

L. J. Forrest

Mr. Forrest has been employed by appellant Rayonier

3. The Agreement was recorded in Vol. 337 of Deeds at p. 444, records of Grays Harbor County, Washington.

4. The Crane Creek Contract is the overall or master contract between Rayonier and the Superintendent, Western Washington Indian Agency, whereby Rayonier agrees to purchase, on stated terms and conditions, all merchantable timber located on the approximately 35,000 acres in the Crane Creek Cutting Unit, Quinault Indian Reservation, that is owned by Indian owners and is offered for sale by the owners to Rayonier. When the timber on an allotment is offered to Rayonier by the Indian

at its Hoquiam, Washington, office since 1947. He is a Vice President of Rayonier, General Manager of Northwest Timber Operations, and the Chief Executive Officer of Rayonier in the State of Washington. Forrest was employed by the Polson Logging Co. from 1927 until the date of its acquisition by Rayonier in 1947 and for a portion of the period served as a member of its Board of Directors and as its Secretary. Plaintiff Polson was also employed by the Polson Logging Co. during the period from 1927 through 1947, was Director and Manager of the Company during 1947 and for some years prior. (R. 135) From 1947 through 1962 both Forrest and Polson maintained homes in Hoquiam and have had occasional contacts with each other. However, during the five years or more preceding 1962 these contacts were infrequent. At all times material to this lawsuit Polson knew that Forrest was employed by Rayonier and both Polson and Forrest knew how to contact each other, although not immediately or within any specific limited period of time. (R. 135-6)

Frank D. Beaulieu

Frank D. Beaulieu, a member of the bars of the Supreme Court of the State of Minnesota, Supreme Court of the United States and the United States District Court

owner, a separate contract is prepared, which contract is executed by the allottee and Rayonier and approved by the Superintendent, Western Washington Indian Agency. Frequently the individual contract between Rayonier and the Indian owner is executed by the Superintendent, Western Washington Indian Agency, for and on behalf of the Indian owner pursuant to a power of attorney previously executed by the owner. A copy of the Crane Creek Contract is Pl. Ex. 4. An example of the standard Indian Allotment Contract is Pl. Ex. 13 and an example of the standard Power of Attorney is Pl. Ex. 7.

for the Western District of Washington, was employed by the Bureau of Indian Affairs at its Hoquiam office until June 1, 1951. (Tr. 427-30) At that time he resigned from the Bureau of Indian Affairs and was employed by Polson to assist Polson and Jackson in connection with Joint Venture matters. (Tr. 434, 443) Beaulieu also performed occasional legal services for Polson on matters not related to the Joint Venture. (Tr. 436) Beaulieu testified that he was an employee of Polson and that his allegiance was to Polson. (Tr. 436) From 1950 through 1962 Polson maintained offices in Hoquiam, Washington, at 419 Simpson Avenue, which office space was divided into two offices with a door between them. Beaulieu was provided with one of the two offices; Polson used the other office. (Tr. 438) Beaulieu was on a salary basis until August 31, 1960, and on an hourly basis thereafter until March 1, 1961. (Tr. 440; Def. Exs. 6 and 7)

Cleveland Jackson

Cleveland Jackson was Chief of the Quinault Indian Tribe from the mid-1930's until his death on November 7, 1960. (R. 136) Jackson was retained by the Polson Logging Company as an independent timber cruiser during the period that Polson was its manager. Jackson continued in this capacity with Rayonier from 1947 until his death in November 1960, with a retainer of approximately \$400 a month. (Tr. 238) Jackson was not required to perform a specific amount of cruising or other services each month, but was expected to be available to perform such services as were requested by Forrest or other Rayonier employees. (Tr. 238-9) As Jackson was almost

seventy years old at the time of his death in 1960, the majority of his services after 1956 involved the obtaining of proxies from Indians for road rights-of-way in the Quinault Indian Reservation. (Tr. 239, 245, 246)

Forrest had known Cleveland Jackson from 1935. F. Arnold Polson had been a close friend of Jackson from the 1930's until Jackson's death. (Tr. 37) Both Polson and Forrest had great confidence in Jackson and trusted him. (Tr. 37; Tr. 604) John W. Libby, who was Forest Manager for the Western Washington Indian Agency, until his retirement in 1965, knew Jackson for years and testified "you could count on his word once it was given. . . ." (Tr. 396)

John W. Libby

Libby is a graduate of the Forestry School, Oregon State College, and was employed by the Bureau of Indian Affairs from 1930 until his retirement in 1965. (Tr. 353-4) Libby's office was at Hoquiam, Washington, from 1950 until June, 1958, when he was transferred to Everett, Washington. From 1950 to 1965 Libby was Forest Manager of the Indian Agency. (Tr. 354)

Nina Bumgarner

Nina Bumgarner, an elderly Indian woman in poor health and badly in need of assistance, was the owner of an undivided one-half interest in each Bumgarner Allotment. In a real sense, Mrs. Bumgarner is a pivotal figure in this suit, because the logging contracts here involved were made as an accommodation to provide her with money. (Ex. 68) She owned timber of substantial

worth, but could not easily realize upon it because her ownership was of an undivided interest and could not be marketed without the remaining interest joining with her. (Ex. 87) Nina Bumgarner wanted her timber logged (Tr. 450, 604), the Western Washington Indian Agency wanted her timber logged (Ex. 68, 87), and Cleveland Jackson and Frank Beaulieu wanted the timber logged (Tr. 464, 450, 604), and Rayonier, while under no need or compulsion, was willing to accommodate all interested by logging the timber, even though it was a departure from Rayonier's then logging plans. (Tr. 604; Ex. 108) Rayonier had no ax to grind, no special benefits to be gained and no ulterior motives by contracting with each of the record owners of the undivided interests in the two allotments. (Tr. 604) The price it agreed to pay and paid for the timber was that established by the Indian Service under Rayonier's Crane Creek Timber Contract and must be regarded as the fair market value of the timber that was removed. (R. 166)

B. Acquisition of a One-Half Interest in the Bumgarner Allotments

On approximately September 26, 1951, Jackson acquired in his name Wallace Bumgarner's undivided one-half interest in the Bumgarner Allotments. (R. 134) Jackson reported to Polson that he had paid Bumgarner approximately \$4,350.40 for his interest. (R. 135) On August 5, 1953, Jackson and his wife, executed a Declaration (Pl. Ex. 3) that he was holding title to an undivided one-half interest in the Bumgarner Allotments on behalf of the Joint Venture and that he was without power to

“contract in respect thereto except in accordance with the terms of the (1951 Joint Venture) Agreement. . . .”⁵ The interests in the two Bumgarner Allotments were but two of over 100 Indian Allotments in the Quinault Indian Reservation in which the Polson-Jackson Joint Venture acquired an interest (Def. Ex. A-1).

C. 1954 Memorandum of Intent

In 1954 Rayonier and Jackson entered into a letter of intent whereby Rayonier advised Jackson that if it was, at some time in the future, provided with a recordable easement for a right-of-way across certain described lands, it would allow Jackson to use its road system for the purpose of logging other described lands. (Pl. Ex. 5) L. J. Forrest of Rayonier handled the negotiations with Jackson and was aware at that time of the existence of a Joint Venture between Jackson and Polson and that parts of the property described in the letter of intent were involved in the Joint Venture. (Tr. 599-600)

Jackson told Forrest at the time that the letter was completed that he had to obtain Polson’s consent to the matter. (Tr. 600) Shortly thereafter Jackson advised Forrest that Polson did not understand the matter and had refused to consent to it. (Tr. 276, 601) Thereafter, on approximately June 2, 1954, Rayonier’s Seattle office received a letter by registered mail from Polson (Pl. Ex. 6), which letter advised Rayonier that Polson had not consented to the letter. Forrest was advised by telephone of the letter but did not see a copy of it (Tr. 305) and

5. The Declaration was recorded on May 5, 1954, with the Auditor of Grays Harbor County, Washington.

was directed at that time by his superior, M. B. Houston, of Rayonier's Seattle office, to abandon the project, which he did. (Tr. 601)

On June 8, 1954, Rayonier obtained a copy of the 1951 Joint Venture Agreement from the Grays Harbor County Auditor. Thereafter, and prior to April 23, 1958, Rayonier's Land Department, at the request of Forrest, made a complete survey of the property within the Quinault Indian Reservation that was owned by Polson, by the Polson-Jackson Joint Venture, and by the Polson family as Rayonier was contemplating attempting to acquire the properties. (R. 138; Tr. 269-271; Pl. E. 31) The acreage and volume of the timber and timber lands were summarized in a Memorandum to Forrest dated April 23, 1958. (R. 138; Pl. Ex. 31) Rayonier's Land Department was also instructed at that time to keep track of what property the Joint Venture acquired, which it did. (Tr. 271)

D. Negotiations With the Bureau of Indian Affairs Prior to the Rayonier-Jackson Contract

John W. Libby became aware that Jackson was acquiring the non-trust interests in Quinault allotments during 1950-1954 and learned of the existence of the Polson-Jackson Point Venture prior to 1954. (Tr. 356)

Prior to 1954 Libby discussed with Jackson the possibility of entering into logging contracts on the two Bumgarner Allotments, the three Snell Allotments and other allotments. (Tr. 357) Also, prior to January 8, 1954, a tentative agreement had been made between Jackson and the Bureau of Indian Affairs to partition the two

Bumgarner Allotments. (Tr. 358) It was in this connection that a letter on behalf of Jackson was written to the Indian Agency on January 8, 1954. (Def. Ex. A-33-B) Libby also discussed the partition of the Bumgarner Allotments several times with Beaulieu at Polson's Hoquiam office. (Tr. 418) On one such occasion Polson was seated in the next office with the door open. (Tr. 361)

In 1956 and 1957 Libby again discussed with Jackson partition of the two Bumgarner Allotments (Tr. 360). Apparently Jackson refused to proceed with the partition because of a federal tax lien. (Tr. 358, 362, 365; Exs. 72, 76, 78, 82) Consequently, in approximately 1958, the Indian Agency undertook to sell Mrs. Bumgarner's undivided one-half interest in the two allotments by public auction. (Tr. 363) Mrs. Bumgarner's undivided one-half interest was advertised for sale, but no bids were received. (Tr. 367)

In all of his dealings from 1951 through 1960 with Joint Venture, Libby understood that Jackson had authority to speak for the partnership. (Tr. 365, 366, 418) Whenever he talked to Beaulieu he was invariably referred by Beaulieu to Jackson. (Tr. 366, 418) Frequently when he conferred with Jackson, Jackson told him that he would consult with Polson and give them an answer. (Tr. 366) Whenever Beaulieu attempted to discuss Joint Venture matters with Polson, he would be directed by Polson to take the matter up with Jackson, not with Polson. (Tr. 498, 499, 446)

Thereafter, on December 30, 1958, the Indian Agency wrote to Mrs. Bumgarner suggesting that her interest in

the Bumgarner Allotments be placed under the Crane Creek Contract with Rayonier. (Ex. 78)

On January 7, 1959, the Superintendent wrote to Cleveland Jackson asking him what progress had been made in removing the lien that had delayed partition of both the Bumgarner and Snell Allotments. (Ex. 80)

On January 13, 1959, Jackson responded advising that the tax lien was still on the property and suggesting that the most feasible way to proceed would be to have Rayonier log the Allotments. (Ex. 82)

E. Events Prior to the Rayonier-Jackson Contract

After January 13 and prior to March 18, 1959, Libby contacted Wilton L. Vincent, the Manager of Rayonier's Land Department, Northwest Timber Division, and discussed with Vincent the possibility of including the two Bumgarner Allotments under the Crane Creek Contract. (Tr. 373) This discussion was followed by a letter of March 18, 1959 (Ex. 86), from the Indian Agency to Rayonier. On March 11, 1959, Nina Bumgarner signed powers of attorney (Pl. Exs. 7 and 8) whereby she authorized the Superintendent to enter into individual contracts on her behalf with Rayonier, pursuant to the Crane Creek Contract. (R. 141)

On May 12, 1959, the Superintendent wrote to Jackson (Ex. 92) stating that:

"We have been authorized to enter into contract with Rayonier for sale of Mrs. Bumgarner's half interest, providing you will agree to sell your half interest under the same terms and conditions."

On May 15, 1959, Jackson responded (Ex. 93) stating that he had talked to Forrest of Rayonier and that he would put one of the Bumgarner Allotments under contract to Rayonier in 1959 and would put the second allotment under contract whenever Rayonier could log it. In this letter Jackson asked that they send a Power of Attorney for him to sign in order to effect a contract on Bumgarner Allotment No. 1679.

During May and June 1959 the Indian Agency made one additional attempt to partition the two Bumgarner Allotments. Prior to June 12, 1959, proposed deeds accomplishing such a partition had been left with Frank Beaulieu (Tr. 487; Def. Ex. A-33-C) and on June 12, 1959, the Superintendent wrote to Beaulieu enclosing new deeds to accomplish the proposed partition. (Ex. 94)

On June 18, 1959, Jackson wrote the Indian Agency (Ex. 95) rejecting the proposed partition. In this letter Jackson stated that:

“Therefore I believe the suggestion I made in my last letter before this last partition proposal came up, in which I wrote that I had contacted Rayonier and that they will log the Shirley Bumgarner allotment this summer if given the contract, as they have a road very close to it, while the other tract is several years away. In this way, Mrs. Bumgarner will get funds soon, which is the only thing she is interested in.”

Also, on June 18, 1959, Beaulieu wrote to the Indian Agency. (Ex. 96) In this letter Beaulieu recited the fact that the previous week Mr. DuBray (an official of the Agency) called at Polson's Hoquiam office and that he and DuBray had conferred regarding an exchange of

interests in the Bumgarner Allotments. At that time the deeds to effect the exchange were left with Beaulieu as he was handling the matter. (Ex. A-33-C; Tr. 487) On Jackson's return Beaulieu discussed the exchange with Jackson and was advised by Jackson that it was unacceptable. (Ex. 96) Beaulieu concluded the letter by stating:

"Mr. Jackson is willing to cooperate in the matter when and if the conditions can be stabilized more in harmony with all the facts and conditions as they exist.

"He has suggested that it would be entirely possible and feasible to work out a plan to contract with Rayonier Incorporated to cut and log all of the timber on either one of the allotments as Rayonier has already constructed logging road in close proximity to these lands. In such a plan he would agree to also permit Rayonier log his half interest. This would afford a fair deal to both, Mr. Jackson and Mrs. Bumgarner without expense to either party. Rayonier would in all probability welcome the opportunity to log the lands on satisfactory prices and operations. Also, Mrs. Bumgarner would obtain cash for her interest which undoubtedly she needs and desires."

On June 24, 1959, the Superintendent responded to Jackson's letter of June 18. (Ex. 97) In this letter Jackson was advised that if Mrs. Bumgarner's interests were to be placed under the Crane Creek contract, it would be necessary for Jackson to execute and return all the copies of the Addendum to Timber Sale Contract that were enclosed.

A copy of the letter to Jackson was forwarded to Beaulieu at Polson's Hoquiam office, together with a letter

to him of June 25, 1959, from the Superintendent responding to his letter of June 18, 1959. (Ex. 98) Shortly thereafter the Indian Agency received the executed Addendums (Exs. 9 and 10) from Jackson.

On July 24, 1959, the Superintendent sent timber contracts covering Nina Bumgarner's interest in the Bumgarner Allotments to Rayonier for execution and return. (Ex. 99)

On August 26, 1959, Rayonier wrote to the Superintendent (Ex. 101) requesting that he forward to Rayonier a copy of the Agreement with Jackson of which the Indian Agency had recently advised Rayonier. On that same date Rayonier forwarded the executed Timber Contracts (Pl. Exs. 13 and 14) on the two Bumgarner Allotments to the Superintendent for approval. (Ex. 102)

Thereafter, on August 27, 1959, Libby, as Acting Superintendent, wrote Rayonier that they had approved the allotment contracts and enclosed copies of the contracts. (Ex. 103) Attached to the copy of the contract for each allotment was a copy of the Addendum signed by Jackson (Pl. Exs. 9 and 10), and Powers of Attorney signed by Nina Bumgarner. (Pl. Exs. 7 and 8) The letter further advised that an advance payment was due in thirty days and requested payment. On September 11, 1959, Rayonier forwarded its check in the amount of \$3,400.85 in payment of the advance payment. (Ex. 106)

Negotiations between Rayonier and Jackson for a timber cutting contract on the Bumgarner Allotments commenced in early 1959 and Forrest and Jackson met to-

gether several times concerning the matter. Wilton L. Vincent was present at one such meeting. (R. 139) Both Vincent and Forrest were aware at that time that an undivided one-half interest in the Bumgarner Allotments was owned by Jackson and was the subject of an agreement between Polson and Jackson, and they discussed that fact during the period they were negotiating with Jackson. (R. 139)

At the time of his meetings with Jackson, Forrest knew that Jackson was managing the Joint Venture to all intents and purposes (Tr. 603; 307), was corresponding and meeting with officials of the Bureau of Indian Affairs (Tr. 604), and had dealt with the United States Forest Service (Tr. 603, 373, 564; Def. Ex. A-49); and that Jackson had discussed possible division of both the Bumgarner Allotments and the Snell Allotments with the Indian Service. (Tr. 604)

In addition, Forrest knew that Polson had an aversion to Rayonier. (Tr. 224-6) During the negotiations Jackson told Forrest that Polson did not want to get involved with Rayonier with respect to the Bumgarner Allotments as Polson did not want to be put in a position of negotiating anything with Rayonier. (Tr. 604) However, Jackson said that Polson was willing to go along and let Mrs. Bumgarner have some money and "take Mrs. Bumgarner off their necks." (Tr. 604) As Beaulieu testified: "She [Mrs. Bumgarner] made it pretty bad for us. She wanted her interests sold." (Tr. 450) Although the Bumgarner Allotments were of little significance to Rayonier, the Bureau of Indian Affairs was exerting pressure on

Rayonier in order to get the matter settled, and after Jackson executed the Addendums with the Bureau of Indian Affairs, Rayonier entered into the Rayonier-Jackson Contract. (Tr. 604)⁶ Neither Forrest nor any other representative of Rayonier communicated with Polson concerning the Rayonier-Jackson contract or the negotiations with respect to it. (R. 140)

Forrest requested that Vincent have Rayonier's attorney prepare an agreement between Rayonier and Cleveland Jackson and his wife. On about August 31, 1959, Vincent requested Rayonier's attorneys to prepare a draft. The requested draft was forwarded to Rayonier on about September 29, 1959, and was executed and delivered to Jackson shortly thereafter. (R. 139) Jackson and his wife executed the contract and returned it to Rayonier on about February 9, 1960. (R. 139) The executed contract is Pl. Ex. 15.

During 1959 and 1960 both Jackson and Polson were anxious to sell the Joint Venture properties. (Tr. 74) During that period Jackson was actively negotiating with several prospective purchasers. (Tr. 67-75)

On February 10, 1960, Beaulieu telephoned Forrest and requested information with respect to whether the Rayonier-Jackson contract (Pl. Ex. 15) would be recorded and when logging would commence on the Bumgarner Allotments. (Def. Ex. A-51; Tr. 291, 611)

6. See also Ex. 68, where the Superintendent states on page 2: ". . . the contracts on the Bumgarner Allotments were instigated by us, following fruitless efforts to affect their partitionment, as the only way we could secure the income from the timber for its owner, Mrs. Nina Bumgarner."

Forrest wrote a note (Def. Ex. A-51) to Wilton Vincent at the time of the telephone call. The contract was not recorded.

F. Investigation By Polson of Joint Venture Properties

In August, 1960, Beaulieu prepared several schedules of Joint Venture lands at the request of Polson. One of these schedules (Def. Ex. A-1), which is dated August 15, 1960, states on page 1 opposite the Bumgarner Allotments: "Log Contract—Jackson, Rayonier, Bumgarner." A second schedule (Def. Ex. A-14), which is of particular relevance, states on page 1 after the Bumgarner Allotments:

"Logging contracts made and approved by and between Cleveland Jackson and Rayonier, Inc., approved by B.I.A. [Bureau of Indian Affairs] 1960."

A third schedule (Def. Ex. A-15) states on page 2 opposite the Bumgarner Allotments "Timber Contract 1960." These schedules, as well as Def. Ex. A-18 were transmitted by Beaulieu to Polson's daughter for preparation of copies and delivery to Polson by letter dated August 19, 1960 (Def. Ex. A-5). Polson discussed the schedules with Beaulieu while he was gathering the information and preparing the schedules and requested that Beaulieu expedite their preparation. (Tr. 96, 97, 100)

In June or July 1960 Polson retained the law firm of Ryan, Askren, Carlson, Bush & Swanson, Seattle, Washington, to represent him in connection with a complete investigation of the Polson-Jackson Joint Venture and its assets, including what property and timber had been ac-

quired and what disposition had been made of the property that had been acquired. Raymond Swanson and Richard K. Bush at that time were and are still partners in that law firm. (Tr. 179, 180)

Raymond Swanson and Beaulieu went to the Everett office of the Western Washington Indian Agency on November 14, 1960, to obtain information concerning Joint Venture assets. Swanson had received a copy of one of Beaulieu's schedules (Def. Ex. A-1) on approximately that date and Swanson and Beaulieu had a copy of it with them on the trip to Everett. (Tr. 425, 466-7) At that time and at their request Libby investigated the status of logging on the parcels listed on the schedule, wrote opposite the Bumgarner Allotments "Portions scheduled for logging" on a copy of the schedule and returned the marked copy to them. (Tr. 425) This marked copy is Ex. A-1-A.

On January 20, 1961, Polson, Bush and Swanson met in Hoquiam, Washington, with Anna Jackson, the widow of Cleveland Jackson, John Kirkwood, her attorney, and James Jackson, her son. Polson testified that it was this meeting that

"alerted me to a situation . . . There was something going on that I didn't know about . . . I [promptly] conferred with my attorney on it . . . I put it in his hands, to get as much information on it as he could." (Tr. 161)

Shortly after the January 20, 1961, meeting in Hoquiam a copy of the Rayonier-Jackson Contract (Pl. Ex. 15) was left on Polson's desk at his Hoquiam office and came

into his possession. (Tr. 163-4)

On January 28, 1961, Beaulieu wrote to Polson (Def. Ex. A-39-A):

“Enclosed is . . . copy of agreement between Cleve and the Indian Bureau regarding sale of the two Bumgarner Allotments, which Jim Jackson [Cleveland Jackson’s son] left at the office for you.”

Appended to the letter was a copy of the Addendum to Timber Sale Contract (Def. Ex. A-39-C and Pl. Exs. 9 and 10) for Allotment No. 1678 and the original of a handwritten note from L. J. Forrest of Rayonier to James Jackson dated November 30, 1960 (Def. Ex. A-39-D) forwarding to Jackson a copy of the Addendum.

Bush received Beaulieu’s letter of January 28, 1961 (Ex. A-39-A), Forrest’s note (Ex. A-39-D) and the Addendum (Ex. A-39-C) from Polson shortly after January 28, 1961 (Tr. 557-8).⁷

Bush went to the Indian Agency Office in Everett, Washington, between the period of February 15, 1961, and April 15, 1961, and obtained information from the Agency with respect to the Joint Venture properties. (Tr. 549-555) At that time he prepared a worksheet setting forth such information (Def. Ex. A-13), page 1 of which worksheet recites with respect to Bumgarner Allotment No. 1679:

“Log in progress. Payments made by Rayonier directly to Jackson, less 10% Ind. Service Fee.”

7. At that time logging had not commenced on Allotment No. 1678 and had been underway for approximately 20 days on Allotment No. 1679 (F.F. 9 and 10, R. 142 and R. 334).

Page 1 of Ex. A-13 recites with respect to Bumgarner Allotment No. 1678:

“No logging. Payments made direct to C. J. [Cleveland Jackson] on undiv. $\frac{1}{2}$, less 10% Indian Service Fee.”

Page 2 of Ex. A-13 recites with respect to the Bumgarner Allotments under the heading “Distributed to Jackson”:

“None through this Agency—paid directly to C. J. [Cleveland Jackson] by Rayonier, Inc. in acc. [accordance] with terms of Add. [Addendum] to Cont. [Contract]:”

The Addendums to which reference is made are Pl. Exs. 9 and 10.

In addition to his trips to the Indian Agency office, Bush also discussed the Rayonier-Jackson Contract with Beaulieu not later than March 1961. (Tr. 562-3)

G. Logging By Rayonier on the Allotments

Road construction by Rayonier was commenced in November, 1960. Logging commenced on January 10, 1961, on the Allotment No. 1679 and on April 17, 1961, on Allotment No. 1678. (R. 142, 334)

During the period February 16 through August 24, 1961, Rayonier made payments totaling \$19,815.36 to Anna Jackson as Executrix of the Estate of Cleveland Jackson, which payments were made pursuant to the Rayonier-Jackson Contract. Over \$12,000 of the payments were made after July 20, 1961 (Def. Exs. A-46-A through A-46-G).

In addition, Rayonier made payments to and received

credits for payments of \$2,193.89 to the Indian Agency during the period of February 16, 1961, through August 24, 1961, for the 10% administrative fee pursuant to the Addendums (Pl. Exs. 9 and 10) and the Rayonier-Jackson Contract. (Pl. Ex. 15) (R. 140)

H. Creditor's Claim and Demands Upon Jackson Estate

In June 1961 Polson filed a Creditor's Claim in the Cleveland Jackson Estate.⁸ (Def. Ex. A-19-E)

At the time that Polson filed the creditor's claim he was aware that the Jackson Estate had received monies from Rayonier for timber that had been cut and removed from the Bumgarner Allotments (Tr. 125) and testified:

“. . . there was some money in evidence and perhaps available . . . and we didn't have the exact accounting of it, and we couldn't get it, so we made a claim for it.” (Tr. 126)

During the last half of 1961 and during 1962 Bush, on behalf of Polson, made a standing demand upon John Kirkwood, as attorney for Anna Jackson as Executrix of the Jackson Estate, for payment to Polson of the proceeds of approximately \$20,000 received by Anna Jackson as Executrix of the Jackson Estate from Rayonier pursuant to the Rayonier-Jackson Contract. (Tr. 566-9)

8. Item “d” of said claim provided: “Monies received by deceased from the sale of timber situated upon lands purchased and owned by deceased and claimant pursuant to an Agreement of Joint Venture between them dated March 5, 1951, as amended by Supplementary Agreement dated January 4, 1955, and as restated and modified by Agreement of Joint Venture dated November 5, 1957, together with interest thereon at the legal rate from the date of receipt of said monies by decedent until paid to claimant. By the terms of said Agreements, said monies were to have been paid in their entirety to claimant.”

I. Communications Between Bush and Rayonier

On November 3, 1961, Richard K. Bush, Polson's attorney, wrote a letter to L. J. Forrest of Rayonier to attempt to arrange a meeting to discuss Cleveland Jackson and his activities (Def. Ex. A-57) and made no mention of any irregularity or problem concerning the Rayonier-Jackson Contract, the Bumgarner Allotments, or the logging of the Bumgarner Allotments by Rayonier. On November 9, 1961, Bush wrote another letter to L. J. Forrest of Rayonier concerning the same subject (Def. Ex. A-56) and again made no mention of the Bumgarner Allotments, the Rayonier-Jackson Contract, or the logging by Rayonier.

In November 1961 Bush conversed with L. F. Marion, one of Rayonier's attorneys, concerning a possible meeting with L. J. Forrest to discuss Cleveland Jackson and his affairs and again made no mention of the Bumgarner Allotments, of the Rayonier-Jackson Contract or any irregularities. (Tr. 578)

J. First Notice to Rayonier—July 23, 1962

On July 23, 1962, Bush wrote to Rayonier (Def. Ex. A-55). This letter was the first time that Polson or anyone on his behalf asserted to Rayonier that Polson was contending that the Rayonier-Jackson Contract was unauthorized or that the logging by Rayonier on the Bumgarner Allotments was unauthorized.

K. Suit By Polson Against Jackson Estate

On approximately February 15, 1963, Polson commenced a lawsuit against Anna Jackson individually and

as Executrix of the Estate of Cleveland Jackson in Grays Harbor County Superior Court. A copy of the complaint in that lawsuit is Def. Ex. A-20-D. It is stipulated that the references in paragraph XI of the First Cause of Action (p. 4, Ex. A-20-D) and paragraph IV of the Second Cause of Action (p. 6, Ex. A-20-D) to "The sum of Twenty Thousand Dollars (\$20,000), more or less," refer to the payments that had been made by Rayonier to Anna Jackson, as Executrix of the Jackson Estate, pursuant to the Rayonier-Jackson Contract for timber cut and removed from the Bumgarner Allotments. (Tr. 132-3, 595)

Polson testified that he considered the \$20,000 in proceeds from the Rayonier-Jackson Contract to be the property of the Joint Venture and made the allegations in paragraph XI of the First Cause of Action (Ex. A-20-D) on the basis that he, Polson, was entitled to have said funds paid to him pursuant to the 1951 Polson-Jackson Joint Venture Agreement. (Tr. 135-6)

L. Settlement of the Suit By Polson Against the Jackson Estate

On March 13, 1963, John Kirkwood advised Bush by letter (Def. Ex. A-43) that Anna Jackson, as Executrix of the Jackson Estate, made no claim to the \$20,000 in proceeds that had been received by her from Rayonier pursuant to the Rayonier-Jackson Contract and offered to transmit the funds to Bush at that time.

Thereafter, a settlement was entered into between Polson and Anna Jackson, individually and as Executrix, of the lawsuit that had been commenced by Polson against

Anna Jackson in Grays Harbor County Superior Court.⁹

The provision of Ex. A-20-B with respect to the contract proceeds was not requested by Kirkwood or by Anna Jackson, but was a part of the settlement agreement prepared by Polson or his attorneys and presented to them. (Tr. 520) The Jackson Estate was making no claim to the \$20,000 in proceeds paid by Rayonier for timber cut and removed from the Bumgarner Allotments at the time that the settlement was made and the agreement executed. (Tr. 520) Pursuant to the settlement agreement (Ex. A-20-B) Bush prepared an escrow agreement between Polson, Anna Jackson and the National Bank of Commerce (Def. Ex. A-20-A) which agreement was executed by Polson, Anna Jackson as Executrix of the Estate of Jackson and the Bank. (Tr. 521, 591)¹⁰ Pursuant to the Escrow Agreement, the contract proceeds were placed in escrow with the National Bank of Commerce and were still held by the Bank at the time of trial.

9. The Settlement Agreement (Def. Ex. A-20-B) provides with respect to the approximately \$20,000 in proceeds received from Rayonier pursuant to the Rayonier-Jackson Contract:

"That the \$20,215.36 payment received by Mrs. Jackson from Rayonier Incorporated, together with interest earned thereon, shall be deposited in an irrevocable escrow account with a mutually agreeable escrow agent with instructions to deliver said monies, together with all interest thereon, to Polson, in the event judgment shall be for defendant in *F. Arnold Polson v. Rayonier Incorporated*, U.S.D.C., Western District of Washington, Cause No. 2865, or in the event said action shall be dismissed without judgment; and to redeliver said monies, together with all interest thereon, to the estate in the event of judgment for plaintiff in said action."

10. The Escrow Agreement provides in part as follows:

"*Delivery to F. Arnold Polson:* In the event that litigation entitled *F. Arnold Polson v. Rayonier Incorporated*, U. S. District Court, Western District of Washington Cause No. 2865, shall be concluded with judgment for Rayonier Incorporated, or, shall be dis-

QUESTIONS PRESENTED

1. Did Cleveland Jackson, as managing partner of the joint venture, have inherent or apparent authority to negotiate and execute the Rayonier-Jackson contract and the Addendums?

2. Did Polson ratify the Rayonier-Jackson contract by any one or more of the following acts:

- a. By delaying with knowledge for at least 18 months in advising Rayonier of his claim that the Rayonier Jackson contract was unauthorized?
- b. By filing a creditor's claim against the Estate of Cleveland Jackson for the contract proceeds?
- c. By making a continuing demand upon the Jackson Estate for payment to him of the contract proceeds?
- d. By bringing suit against the Jackson Estate for the contract proceeds?
- e. By settling the lawsuit against the Jackson Estate and exercising dominion over the contract proceeds?

3. Was the plaintiff, because of his conduct, estopped:

- a. To deny the validity and enforceability of the Rayonier-Jackson contract?
- b. To recover more than simple or single damages for either timber trespass or for waste?

4. Were the Rayonier-Bumgarner Contracts valid and enforceable contracts, and could Rayonier as a purchaser from Nina Bumgarner, a cotenant, have committed either statutory trespass or waste?

missed without judgment, the property deposited as above-described shall be delivered to said F. Arnold Polson.

"Delivery to Anna A. Jackson: In the event that the said litigation above-described shall be concluded with judgment for F. Arnold Polson, the property deposited as above-described shall be delivered to said Anna A. Jackson."

5. Was Rayonier acting in bad faith and without probable cause to believe that it was proceeding under valid and enforceable contract rights when it logged the Bumgarner Allotments?

6. Since Jackson signed the Rayonier-Jackson contracts, was the plaintiff entitled to recover damages for the full value of the timber from the Bumgarner Allotments, rather than a lesser amount corresponding to his interest in the Polson-Jackson Joint Venture?

7. Was the plaintiff entitled to interest on single damages from the date of trespass?

8. Did the Court err in not entering adequate Findings of Fact and Conclusions of Law as required by Rule 52(a), F.R.C.P.?

9. Did the court err in making material Findings of Fact and Conclusions of Law that are not supported by the evidence?

SPECIFICATIONS OF ERRORS

I.

The Court erred in entering the following mixed Findings of Fact and Conclusions of Law:

1.1 *Finding and Conclusion No. 4 (R. 335)**

This Finding and Conclusion is clearly erroneous as it is in conflict with the testimony of the plaintiff and of his attorney, is not supported by the record, and is based

*This Finding & Conclusion, as well as each of the other Findings & Conclusions to which error is assigned, are set forth in an Appendix to the brief.

upon the erroneous premise that Polson was not aware of the Rayonier-Jackson Contract “until the spring of 1961” and “did not have full knowledge of all material facts regarding the contract until July of 1961.” The conclusion that Polson’s delay in notifying Rayonier until July 23, 1962, was reasonable is not supported by the record and is erroneous.

Further, the Court’s conclusion that Polson’s failure to notify Rayonier of the lack of authority of Jackson did not prejudice or mislead Rayonier is clearly erroneous and contrary to undisputed facts. There is no question but that Rayonier was substantially prejudiced if it incurred a liability for treble damages in the amount of \$69,000 for timber valued at \$23,000 that it cut and removed from the Bumgarner Allotments, the greater portion of which was cut during the five months subsequent to the date when Polson admitted he had in his possession a copy of the Rayonier-Jackson Contract.

In addition, Rayonier was substantially prejudiced as it made payments totalling approximately \$20,000 to the Estate of Cleveland Jackson pursuant to the Rayonier-Jackson Contract, \$12,000 of which was paid after July 1, 1961, and made payments to the Bureau of Indian Affairs pursuant to the Addendums and the Contract of over \$2,200 for fees for administering the timber from the Allotments.

1.2 Finding and Conclusion No. 5 (R. 335) as follows:

Exhibit B: (Judge’s Oral Opinion which he incorporated by reference)

1.2.1 Page 2, para. 5 (R. 340-1), which commences on line 22, page 2, and ends on line 5, page 3.

This Finding and Conclusion is erroneous as it ignores the fact that Jackson as Managing Partner of the joint venture had inherent authority pursuant to the Uniform Partnership Act to negotiate and execute the Rayonier-Jackson Contracts. It is further erroneous for the reason that Rayonier, as a purchaser from Nina Bumgarner under the Rayonier-Bumgarner contracts, could not as a matter of law have committed either statutory trespass or waste.

1.2.2 Page 3, para. 1. (R. 341) This Finding and Conclusion is erroneous for the following reasons:

(i) It ignores the defense that Jackson, as Managing Partner of the joint venture, had inherent authority under the provisions of Section 9 of the Uniform Partnership Act to negotiate and execute the Rayonier-Jackson Contract.

(ii) It ignores the fact that Polson as a matter of law either ratified the Polson-Jackson Contract or is estopped to question its validity by reason of his following actions: remaining silent for at least 18 months and allowing Rayonier to log the Allotments; filing a creditor's claim in the Jackson Estate and claiming the contract proceeds; making a continuing demand through his attorney to have the proceeds paid to him by the Jackson Estate; commencing a lawsuit against the estate; and entering into a Settlement Agreement and an Escrow Agreement whereby he exercised dominion over the proceeds.

1.2.3 Page 4, para. 1, 2 and 3 (R. 342 and 343) (para. 3 carries over to line 5, page 5).

(i) The portion of para. 1, page 4 (R. 342), that there was no evidence that Beaulieu:

“any time had, was held out as having, or exercised any responsibility, authority, or agency for either Polson individually or for the Polson-Jackson joint venture concerning the sale of either land or timber owned by the joint venture.”

is contrary to the letters that Beaulieu wrote that were introduced into evidence (*e.g.*, Ex. 96), to his testimony (*e.g.* Tr. 487) and that of Libby. (Tr. 418) Para. 2 is erroneous as it is clear from Beaulieu’s testimony and the exhibits that his duties were not “largely, if not wholly, clerical and ministerial, and . . . primarily, if not exclusively, concerned with the acquisition of timberlands by the Joint Venture and not the sale of Joint Venture property.” Beaulieu testified that he “bought all of them. I wrote the deeds, practically arranged a sale, because they were heirship tracts of land and I knew who were the owners.” (Tr. 443), (see also Tr. 487, 418)

(ii) Page 4, para. 3, lines 24 and 25, is clearly erroneous as is demonstrated by the letter that Beaulieu wrote (Ex. 96), by his testimony (Tr. 487), and by the testimony of John W. Libby. (Tr. 378, 418)

1.2.4 Page 5, para. 2 (lines 15 to 17) and para. 4, which carries over to line 5, page 6. (R. 343, 344)

These holdings are erroneous for the reason Beaulieu’s knowledge was acquired as an employee of Polson’s while assisting on Joint Venture matters and Polson, as a part-

ner, is charged as a matter of law with Beaulieu's knowledge.

1.2.5 Page 6, para. 1. (R. 344)

This Finding and Conclusion is contrary to the facts in this case and the applicable law, all as outlined in the Statement of Facts and the Argument portions of this brief.

In addition, the Court did not consider whether Rayonier was entitled to the benefit of the mitigation of damages provisions of R.C.W. 64.12.040, which section would reduce the damage from treble to single damages and the Court ignored the question of whether Polson's knowledge and failure to inform Rayonier should estop him from recovering more than single damages.

Exhibit C (Judge's Oral Opinion which he incorporated by reference)

1.2.6 Page 2, para. 3 (R. 349)

This holding is contrary to Washington law as there is no Washington authority for the imposition of interest on unliquidated damages for statutory trespass to timber.

1.2.7 Page 6, paras. 1 and 2 (R. 353)

This holding is contrary to both fact and law as Polson was allowed treble damages for the full value of the Joint Venture timber, not the amount that corresponded to his percentage of interest in the partnership.

Exhibit D (Judge's Oral Opinion which he incorporated by reference)

1.2.8 Page 3, para. 1 (R. 361)

This holding is contrary to both the undisputed facts as outlined in the Statement of Facts and the law as set forth in the Argument portion of this brief.

1.3 *That portion of Finding of Fact and Conclusion of Law No. 2 (R. 334, 335) as follows:*

“it is the finding of the court that ‘Fact Not to be Contested’ No. 8 is hereby modified by the caveat stated by the plaintiff in connection therewith. It is the specific finding of this Court that Mr. Libby did not have authority to authorize a contract without procuring the approval of Polson, which approval was not obtained.”

together with that portion of Finding of Fact and Conclusion of Law No. 5 that is lines 5-12, p. 10, Ex. C. (R. 357)

These portions of the Findings and Conclusions are erroneous for the following reasons:

a. Polson had no standing to question the Rayonier-Bumgarner Contracts, which contracts the parties have made no attempt to rescind or revoke or terminate. (R. 142 and 334)

b. It is in conflict with the testimony of John W. Libby and with the exhibits and other testimony introduced at trial.

II.

The court erred in not making the following Findings of Fact and Conclusions of Law:

2.1 That Jackson had either inherent or apparent au-

thority to negotiate with the Bureau of Indian Affairs and with Rayonier and to execute the Addendums and the Rayonier-Jackson Contract.

2.2 That the Rayonier-Jackson Contract is a valid and enforceable contract.

2.3 That the Addendums are valid and enforceable agreements between the Joint Venture and the Bureau of Indian Affairs.

2.4 That the Rayonier-Bumgarner Contracts are valid and enforceable contracts.

2.5 That the plaintiff had no standing to question the validity of the Rayonier-Bumgarner Contracts.

2.6 That Rayonier, by virtue of the legal relationship it occupied because of the Rayonier-Bumgarner Contracts, did not commit statutory trespass or waste when it logged the Bumgarner Allotments.

2.7 That Rayonier was acting in good faith and with probable cause to believe it was acting under a valid contract when it logged the Bumgarner Allotments.

2.8 That plaintiff, by his conduct, ratified the Rayonier-Jackson Contract.

2.9 That the plaintiff, by his conduct, was estopped to deny the validity and enforceability of the Rayonier-Jackson Contract.

2.10 That if plaintiff is entitled to any recovery he was estopped by his conduct to recover more than single damages for timber trespass or waste.

III.

3.1 The court erred in not entering adequate Findings of Fact and Conclusions of Law with respect to the issues in this case.

IV.

4.1 The court erred in not making additional Findings of Fact pursuant to defendant's motion for Additional and Amended Findings. (R. 288-333)

V.

5.1 The court erred in entering judgment for plaintiff for treble damages for trespass together with interest on single damages from date of trespass.

ARGUMENT

PART I

Jackson Had Inherent and Apparent Authority, as Managing Partner, to Negotiate with Rayonier and with the Bureau of Indian Affairs and to Execute the Rayonier-Jackson Contract and the Addendums. (Specifications of Error 1.1, 1.2.1 through 1.2.5, 1.2.8, 2.1, 2.2, 2.3, 2.7, 5.1)

Rayonier does not need to rely upon Jackson's actual authority to commit the Jackson-Polson interest to the Rayonier-Jackson Contract. (Pl. Ex. 15) It is clear that Jackson had inherent and apparent authority, as managing partner, to execute that contract as well as the Addendums (Pl. Exs. 9 and 10).

Inherent and Apparent Authority Defined

Inherent authority is defined in Section 8A of the Restatement of Agency, Second, as the power of an agent

which is derived not from authority, apparent authority or estoppel, but solely from the agency relationship. The law with respect to the inherent authority of a partner has been incorporated in Section 9 of the Uniform Partnership Act (R.C.W. 25.04.090(1)) which provides:

“25.04.090 Partner agent of partnership as to partnership business. (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.”

Apparent authority is defined by Section 8, Restatement of Agency, Second, as the power to affect the legal relations of another by transactions with third persons, professedly as agent for the other (the Polson-Jackson Joint Venture) arising from and in accordance with the other's (Joint Venture's) manifestations to such third persons. This section has been cited with approval by the Washington Supreme Court in a number of cases, *e.g.*, *Debentures Inc. v. Zech*, 192 Wash. 339, 350, 73 P.2d 1314, 1319 (1937).

The application of either test of authority to the activities of the managing partner of a partnership is difficult. The provision of Section 9 of the Uniform Act of “apparently carrying on in the usual way” could, in an appropriate case, include both inherent and apparent authority for the test of “in the usual way” must be made in the context of the actual operation of the business.

Jackson Had Authority, as Managing Partner, to Negotiate and to Execute the Rayonier-Jackson Contract and the Addendums.

- 1. The business of the Joint Venture included the logging or contracting for the logging of timber.**

The 1951 Joint Venture Agreement (Pl. Ex. 1) provided that the purpose of the Joint Venture was the “acquiring, selling, exchanging and disposing of timber and timberlands in Western Washington, including the logging or contracting for the logging of any timber so acquired.” (R. 133 and 335) Clearly, Jackson was carrying on in the usual way the business of the partnership under the provisions of Section 9 of the Uniform Partnership Act when he negotiated with Rayonier and with the Bureau of Indian Affairs to have the timber on the Bumgarner Allotments logged, for this is squarely within the scope of the purpose of the Joint Venture.

- 2. Jackson was the manager of the partnership and its affairs were handled entirely by him.**

The trial court made a finding that

“Cleveland Jackson was the Manager of the Joint Venture and its affairs were handled primarily by Jackson.” (R. 335)

Although the court used the word “primarily” in the Finding, Polson, in Def. Ex. A-45, which is the Joint Venture tax return for the year 1961 that was signed by him, stated in column 5, Schedule M, on page 3 that:

“Since inception of joint venture until 1961, the affairs of the venture were handled *entirely* by deceased partner. [Jackson] Surviving partner (Polson) contributed all capital. Subsequent to demise

of managing partner (November, 1960) . . .” (Emphasis added)

3. Jackson was carrying on the partnership business in the usual way.

The decisions by the Washington Supreme Court state that in order to prove inherent authority on the part of a partner it is only necessary to show that the transaction was one which seemed to be for partnership purposes and was not an unusual transaction for the partnership or one ordinarily detrimental to a partnership engaged in that type of business. *Herr v. Brakefield*, 50 Wn.2d 593, 314 P.2d 397 (1957); *Melosevich v. Cichy*, 30 Wn.2d 702, 193 P.2d 342 (1948); and *Merrill v. O'Bryan*, 48 Wash. 415, 93 Pac. 917 (1908).

In the *Herr* case the court stated:

“While the evidence regarding the practice of selling entire herds of cattle would not lead to the inference that such a sale was *necessary* to the successful conduct of the cattle business and the farming operation, the showing was that such sales were not unusual and were appropriate and not ordinarily detrimental to enterprises of this kind. Especially in view of the fact that the sale of this herd did not destroy the farming operation and the further fact that Brakefield had, in all of the plaintiffs’ dealings with him, acted as the managing partner with the tacit consent of Mrs. Stidham, we believe that the court was unjustified in concluding that he had no apparent authority to make the sale in question.” 50 Wn.2d at 596-7, 314 P.2d at 399.

In addition, in determining whether Jackson was “apparently carrying on in the usual way the business of the partnership,” it is illuminating to consider his conduct over the years with respect to the partnership and its affairs.

Polson himself represented that Jackson was the managing partner and that the partnership affairs were handled entirely by Jackson. (Def. Ex. A-45) During the years that the partnership was in existence Jackson acquired all of its real property, record title to which was in his name. (Def. Ex. A-19-L, p. 2) The Joint Venture bank account was in Jackson's name and Polson did not supervise the expenditure of funds. (Def. Ex. A-19-H, p. 4) Jackson was involved in continuous negotiations with the Bureau of Indian Affairs with respect to partition or logging of the Bumgarner Allotments and the Snell Allotments.¹ Whenever Beaulieu had a question, he was referred by Polson to Jackson. (Tr. 498-9, 446-7) Whenever John Libby of the Bureau of Indian Affairs had a question, he was referred by Beaulieu to Jackson, never to Polson. (Tr. 366, 418-20). Whenever Francis McCrory, Nina Bumgarner's son, had a question, he likewise was referred by Beaulieu to Jackson. (Tr. 333-4)

Polson testified that in 1960 both he and Jackson were anxious to sell the Joint Venture properties. (Tr. 74)

In a deposition that was taken of him in another lawsuit prior to the present action, Polson testified as follows concerning Jackson's activities with respect to a proposed sale of the Joint Venture timber and land in 1960:

"Q. A sale of all of your interests appeared to be in the offing?

"A. Yes . . .

"Q. All of the property acquired with the funds which you had advanced?

1. See Def. Exs. A-8, A-9 and A-10, and Exs. 72, 73, 75, 76, 80, 82, 83, 92-98; Tr. 355-390, 418-420.

“A. I couldn’t say. It didn’t get that far. He [Jackson] was handling it.” (Tr. 73)

4. Rayonier and the Bureau of Indian Affairs had no knowledge of restrictions, if any, on Jackson’s authority.

A proviso to paragraph 1 of Section 9 of the Uniform Partnership Act excludes from the operation of that section those instances where

“... the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.”

Section 3 of the Uniform Partnership Act (R.C.W. 25.04.030) defines knowledge as that term is used in Section 9 of the Act as follows:

“25.04.030 Interpretation of knowledge and notice.

(1) A person has knowledge of a fact within the meaning of this chapter not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.”

(a) *Rayonier’s knowledge*

Rayonier’s only knowledge within the scope of the above provision was that imposed by the 1951 Joint Venture Agreement, (Pl. Ex. 2), which agreement imposed no restrictions on Jackson’s authority. It provided only that:

“Sales or other dispositions of the tracts so acquired, or any of them, including contracts for the logging of timber thereon, shall be made from time to time as agreed upon by the parties hereto. . . .”

It will be argued that Rayonier could not rely on Jackson’s authority as managing partner as it had notice by letter to its Seattle office in June, 1954, (Pl. Ex. 6), that

Jackson could not make right-of-way commitments but had only the authority granted by the 1951 Joint Venture Agreement. Forrest, who negotiated the Rayonier-Jackson contract in 1959, had never seen this letter, but was advised in 1954 by telephone from Seattle that Polson had objected in writing to the memorandum of intent relating to rights-of-way that is Pl. Ex. 5. The information that Polson objected to that memorandum came as no surprise to Forrest, as Jackson had told him that he had to get Polson's approval and subsequently had advised him that Polson did not agree. (Tr. 600, 601) It was at this time that Forrest first read a copy of the Joint Venture Agreement, although he had been aware of an agreement between Polson and Jackson as early as 1947.

Subsequent to 1954 Forrest became aware of Jackson's negotiations with the Bureau of Indian Affairs to partition the Bumgarner and Snell Allotments or to have them logged, which negotiations took place over a period of five years. Forrest and W. L. Vincent of Rayonier were kept informed of this activity, which included conferences and correspondence between the Bureau of Indian Affairs and Jackson and Beaulieu, through discussions with Bureau of Indian Affairs officials. (Tr. 603-4, 278-9, 209, 211, 373) It was certainly reasonable for them to assume that these activities were done with the consent and approval of Polson. Consequently, when Forrest was advised by Jackson and by the Bureau of Indian Affairs that Jackson had executed the Addendums (Ex. 101) and was advised by Jackson that Polson was agreeable to having Rayonier log the Bumgarner Allotments (R. 604), it was also reasonable for Forrest to assume that Jackson as Man-

ager of the Joint Venture had the requisite approval of Polson in order for him to contract to have Rayonier log the Bumgarner Allotments. In addition, Beaulieu telephoned Forrest on February 10, 1960, which was the day after Jackson executed the contract, and inquired whether the contract would be recorded and when logging would commence. (Tr. 291, 611; Def. Ex. A-51)

(b) *The Bureau of Indian Affairs' knowledge*

Officials of the Bureau of Indian Affairs were aware that the Bumgarner Allotments were subject to the 1951 Joint Venture Agreement. However, officials of the Bureau of Indian Affairs had been negotiating with Jackson and with Beaulieu over the years with respect to either partitioning or logging the Bumgarner Allotments, as well as the Snell Allotments. There had been a continuing exchange of correspondence (Exs. 60 through 100) between the Bureau and Jackson and Beaulieu with respect to the Allotments. A number of discussions had taken place at Polson's offices in Hoquiam and on at least one occasion Polson was in the next office with his door open. As John W. Libby testified:

“... in my dealings in connection with these properties, I considered Cleve Jackson to be the spokesman for the partnership. He was the man we could reach when we wanted to discuss these things. . . . Mr. Beaulieu normally referred us back to Mr. Jackson, not to Mr. Polson, and we just assumed that Mr. Jackson was the spokesman for the partnership, and we dealt directly with him on all of these matters.” (Tr. 418) (See also Tr. 366)

(c) *Rayonier and the Bureau of Indian Affairs had the right to rely on Jackson and his representations.*

It was not Rayonier nor the Bureau of Indian Affairs

that decided how the Polson-Jackson partnership would be operated. That decision was made by Polson and Jackson.

We are considering in this lawsuit, not the authority of an employee, but the authority of the managing partner of a partnership to enter into a contract. In order to negotiate with Rayonier and with the Bureau of Indian Affairs, Jackson necessarily had to make statements of fact, such as whether or not the Joint Venture was agreeable to contracting on certain stated terms and conditions.

Forrest had known Jackson from 1935. Polson had been a close friend of Jackson's from the 1930's until his death. Both Polson and Forrest had great confidence in Jackson and trusted him. Libby of the Bureau of Indian Affairs had known Jackson for years and testified that you could depend upon Jackson doing what he said he would do. It is submitted that the court's remarks in connection with Frank Beaulieu are equally applicable to Rayonier and the Bureau of Indian Affairs. There the court stated:

"There is not the slightest evidence in the record to show that Beaulieu had any reason to suspect Jackson's integrity and responsibility until such time after his death or that he would not do that which he was required to do by the specific limitations of the Joint Venture agreement. . . .

"In the circumstances, I believe Beaulieu was entirely fair, honest and reasonable in assuming that if the Bumgarner transaction were to mature into a sale, that Jackson had or would procure and have the necessary approval and authority of Polson, and consequently, he, Beaulieu, had no reasonable basis

for concerning himself with the matter of Jackson procuring such approval and authority from Polson.” (R. 343)

5. The Joint Venture is bound by Jackson’s representations concerning Polson’s knowledge and approval.

The representations by Jackson concerning Polson’s knowledge and approval of a contract with Rayonier to log the Bumgarner Allotments were within the scope of Jackson’s authority as managing partner of a partnership, one whose purposes was the “logging or contracting for the logging of any timber so acquired.” As such, the representations are within the scope of Section 11 of the Uniform Partnership Act (R.C.W. 25.04.110), which provides:

“25.04.110 **Partnership bound by admission of partner.** An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this chapter is evidence against the partnership.”

6. The execution of the Rayonier-Jackson contract and the Addendums was within the authority conferred in Jackson as managing partner.

The Washington Supreme Court in 1941 in *Quist v. Zerr*, 12 Wn.2d 21, 36, 120 P.2d 539, 546 (1941), quoted with approval Sections 50 and 73 of the Restatement of Agency, which sections are as follows:

“§ 50. When Authority to Contract Inferred

“Unless otherwise agreed, authority to make a contract is inferred from authority to conduct a transaction, if the making of such a contract is incidental to the transaction, usually accompanies such a transaction, or is reasonably necessary to accomplish it.”

“§ 73. What Authority Is Inferred

“Unless otherwise agreed, authority to manage a business includes authority:

“(a) to make contracts which are incidental to such business, are usually made in it, or are reasonably necessary in conducting it;”

Polson spent his adult life in the timber business and dealing in timber and timberlands. He had always resided in Grays Harbor County and was familiar with timber values and timber holdings. He entered into the Joint Venture with his long-time friend and employee, Cleveland Jackson, Chief of the Quinault Tribe, and with Jackson acquired interests in over 100 different allotments in the Quinault Reservation, but in Jackson's name.²

To further his plan of operations, Polson hired Frank Beaulieu from the Hoquiam Indian Service Office. Beaulieu is an attorney whose duties with the Indian Service had involved Indian probates and gave him great familiarity with various Indian ownerships in the vicinity. (Tr. 428-30)

Polson, himself sophisticated in the business, left the management of the affairs to two sophisticated associates, Cleve Jackson and Frank Beaulieu. Considering the fact that the business of the Joint Venture included “contracting for the logging of any timber” and that the business had been conducted entirely from its inception by Jackson, as managing partner, the execution by Jackson of the Addendums and the Rayonier-Jackson Contract was clearly within Jackson's authority under the tests set out above

2. At least some acquisitions thus made were apparently at bargain prices; witness that they paid \$4,350.40 for the undivided one-half interest in the two Bumgarner Allotments in 1951, for which they have received over \$20,000 in stumpage payments and which still have a residual value of more than \$16,000. (R. 166)

and Polson cannot now disclaim the authority of either Jackson or Beaulieu and the imputation of their knowledge to him or repudiate the representations they made in the course of managing the Joint Venture and its properties.

PART II

Regardless of Jackson's Authority, Polson Ratified the Rayonier-Jackson Contract and the Addendums by His Conduct (Specifications of Error Nos. 1.1, 1.2.2 through 1.2.5, 1.2.8, 2.2, 2.3, 2.8, 5.1)

Ratification Defined

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account whereby the act is given effect as if originally authorized by him. Sec. 82, Restatement of Agency, Second.¹

Affirmance by Polson of the Rayonier-Jackson Contract and the Addendums Is Established by His Failure To Timely Repudiate.

1. General Rule Defined.

3 Am. Jur.2d, *Agency*, Sec. 178, pages 563-4, sets forth the general rule with respect to affirmance by silence as follows:

1. With respect to the events not required and not preventing ratification, Section 92, Restatement of Agency, Second, provides in part as follows:

“§ 92. Events Not Required for and Not Preventing Ratification:

“An affirmance by the principal of a transaction with a third person is not prevented from resulting in ratification by the fact:

...“(d) that the agent conducting the transaction has died or lost capacity; or

...“(f) that the agent or the other party knew the agent to be unauthorized; or

“(g) that the principal does not communicate with anyone.”

“A principal, after receiving information that an act has been done without actual or apparent authority by one purporting to act as his agent on his behalf, is not bound by that act under the law of agency unless he ratifies the act; but he may and must elect to repudiate or ratify such act promptly or at least within a reasonable time. . . .

“Whether there has been ratification in a particular case is ultimately and ordinarily a question of fact. Strictly speaking, therefore, a failure to repudiate, or silence or acquiescence, after learning of an unauthorized act in a case where the principal has an opportunity to repudiate or object to the act, does not of itself constitute ratification. Yet it is, if the one purporting to act as agent is not a mere stranger or intermeddler, cogent or prima facie evidence on which ratification may be inferred in the light of surrounding circumstances.”

In Section 179 of 3 Am. Jur.2d, *Agency*, pp. 565-6, the general rule with which respect to the time within which to repudiate an unauthorized transaction is set forth as follows:

“While a failure promptly to repudiate the agent’s acts may under some circumstances amount to an adoption or ratification thereof, as where a failure to repudiate speedily may impose loss or injury upon the third person, the rule applicable generally is that where an act is done without authority, under an assumed agency, it is the duty of the principal to disavow and repudiate it in a reasonable time after information of the transaction if he would avoid responsibility therefor. . . . If after a reasonable time he does not so disaffirm, ratification will be presumed, especially if the principal, with knowledge of the unauthorized act, remains silent or acquiesces therein for a long period of time without objection.”

Section 94 of Restatement of Agency, Second, says:

“§ 94. Failure to Act as Affirmance

“An affirmance of an unauthorized transaction can be inferred from a failure to repudiate it.”

2. The Washington court follows the general rule.

The question of ratification by silence has been before the Washington Supreme Court on a number of occasions. In *Waldron Co. v. Beattie Mfg. Co.*, 113 Wash. 533, 537, 194 Pac. 557 (1920), the court considered an objection by the appellant to an instruction to the jury whereby the jury was told that unless the defendant, after knowledge of the unauthorized act, communicated its repudiation to the plaintiff, then the appellant was guilty of unfair dealing and ratified the contract.

The court held that the instruction was correct, quoting the following statement from a previous opinion in *Baker v. Seattle and Puget Sound Packing Co.*, 95 Wash. 45, 48, 163 Pac. 17 (1917):

“Even if the agent had no authority to make the contract which was made with the respondent, after the principal had been informed of the contract and did not promptly reject it, but acquiesced therein, it seems too plain for argument that this would amount to a ratification of it.” 113 Wash. at 537, 194 Pac. at 558.

See also *Tobias v. Towle*, 179 Wash. 101, 105, 35 P.2d 1114 (1934), adhered to by the court sitting en banc in 179 Wash. 107, 41 P.2d 1119 (1935), and approving Restatement of Agency, Section 94, quoted above; *Northwestern Lum. Co. v. Cornell*, 99 Wash. 250, 169 Pac. 590 (1917); *Lemcke v. Funk & Co.*, 78 Wash. 460, 139 Pac. 234 (1914); *Ankeny v. Young Bros.*, 52 Wash. 235, 100 Pac. 736 (1909).

3. Polson, by his conduct ratified the Rayonier-Jackson Contract and the Addendums.

A stronger case for the application of the doctrine of ratification by silence can scarcely be imagined. The applicable facts are as follows:

(a) In November of 1960, Beaulieu and Raymond Swanson, one of Polson's attorneys, obtained the information that portions of the Bumgarner Allotments were scheduled for logging that is written on Def. Ex. A-1-A opposite the statement "log contract—Jackson, Rayonier, Bumgarner."

(b) On January 20, 1961, Polson and his attorneys, Richard K. Bush and Raymond Swanson, attended a meeting in Hoquiam, Washington. When asked when he first learned of Rayonier logging the Bumgarner Allotments, Polson testified that something at that meeting "alerted me to a situation. . . . There was something going on that I didn't know about. . . . I [promptly] conferred with my attorney on it. . . . I put it in his hands, to get as much information on it as he could." (Tr. 159-161)

(c) Shortly after the January 20 meeting a copy of the Rayonier-Jackson contract came into Polson's possession. (Tr. 163-4)

(d) On January 28, 1961, Beaulieu wrote a letter to Polson (Def. Ex. A-39-A). Appended to this letter was a copy of the Addendum for Allotment No. 1678 (Def. Ex. A-39-C) and the original of a hand-written note from L. J. Forrest of Rayonier to James Jackson, dated November 30, 1960 (Def. Ex. A-39-D) forwarding to Jackson a copy of the Addendum.

(e) Attorney Bush received Beaulieu's letter of January 28, 1961 and the Addendum from Polson shortly after January 28, 1961. (Tr. 557-8)

(f) Bush went to the Western Washington Indian Agency office in Everett, Washington between the period of February 15, 1961 and April 15, 1961 and obtained the information on the Bumgarner Allotments that logging had not yet commenced on Allotment No. 1678, that logging was in progress on Allotment No. 1679 and that payments were being made directly by Rayonier to Jackson, less the 10 percent administrative fee. (Def. Ex. A-13)

(g) Bush discussed the Rayonier-Jackson contract with Beaulieu not later than March, 1961. (Tr. 562-3)

(h) Logging did not commence on Allotment No. 1679 until January 10, 1961. (R. 142)

(i) Logging did not commence on Allotment No. 1678 until April 17, 1961, which allotment provided over 65 percent of the value of the timber removed from the two Bumgarner allotments. (R. 142 and 166)

(j) During the period from February 16, through August 24, 1961, Rayonier made payments totalling \$19,815.36 to Anna Jackson as Executrix of the estate of Cleveland Jackson pursuant to the Rayonier-Jackson contract. (Def. Exs. A-46-A through F) In addition Rayonier made payments to and received credits for payments of \$2,193.89 to the Indian Agency during the same period for the 10 percent administrative fee pursuant to the Addendums and the Rayonier-Jackson contract.

(k) On November 3, 1961 (Def. Ex. A-57) and again on November 9, 1961 (Def. Ex. A-56) Richard K. Bush, Polson's attorney, wrote letters to L. J. Forrest of Rayonier concerning Cleveland Jackson and his affairs and on neither occasion made any mention of any irregularity or problem concerning the Rayonier-Jackson contract, the Bumgarner Allotments or the logging on the Bumgarner Allotments by Rayonier. At approximately the same time Bush conversed with L. F. Marion, one of Rayonier's attorneys, concerning a possible meeting with L. J. Forrest to discuss Cleveland Jackson and his affairs and made no mention of the Bumgarner Allotments, or any irregularities with respect to the Rayonier-Jackson contract.

(l) On July 23, 1962, Bush wrote to Rayonier (Def. Ex. A-55). This was the first time that Polson or anyone on his behalf informed Rayonier that Polson was contending that the Rayonier-Jackson Contract was unauthorized.

(m) There is no evidence that Polson at any time prior to the commencement of this lawsuit communicated to the Bureau of Indian Affairs his contention that the Addendums (Exs. 9 and 10) were unauthorized.

(n) Notwithstanding the fact that Bush and John Kirkwood, the attorney for the Executrix of the Cleveland-Jackson estate, had frequent contacts during 1961 and 1962, including a short discussion in 1961 involving the Rayonier-Jackson contracts proceeds, the first time that Kirkwood knew that Polson contended the Rayonier-Jackson contract was unauthorized was approximately the date of commencement of this lawsuit on August 21, 1962. (Tr. 514-516)

With the above factual background in mind, it is difficult to understand the trial court's finding that "Polson was not aware of the existence of the logging contract until the spring of 1961." (F.F.&C.L. 4, R. 335) In addition, there is no evidence to support the additional finding that: "He [Polson] did not have full knowledge of all material facts regarding the contract until July of 1961." (F.F.&C.L. 4, R. 335)

Ignoring the fact that Polson should have been aware of the Rayonier-Jackson contract in the fall of 1960 by reason of the information on the three schedules prepared for him by Beaulieu, (Def. Exs. A-1, A-14 & A-15) Polson clearly had full knowledge of the Rayonier-Jackson contract not later than February 1, 1961, at which time he had a copy of the contract in his possession. He also obtained a copy of the Addendum shortly after that time and gave it to Bush.

It is obvious that the belated attempt by Polson to repudiate the contract on July 23, 1962, and the subsequent lawsuit was but an afterthought on his part. That Polson never had any intention until 1962 of attempting to repudiate the Rayonier-Jackson contract is clear from his conduct and that of his attorney, Bush. In 1954 when Jackson entered into a simple memorandum of intent, (Pl. Ex. 5) Polson quickly exhibited his non-concurrence by writing Rayonier by Registered Mail, even though the letter of intent was nothing more than a simple statement that if Rayonier in the future was furnished a legally sufficient easement, it would do certain things at that time.

What happened after Polson admittedly had knowledge of the Rayonier-Jackson contract and of Rayonier's plans to log and that logging was in progress? With counsel at his side at all times, Polson did not advise Rayonier of his contention that the contract was unauthorized until July 23, 1962—eighteen months after he first obtained a copy of the contract. In fact, in June, 1961, Polson filed a creditor's claim in the Jackson estate, whereby he sought to have the funds from the logging turned over to him. In addition, through his attorney he had three contacts with Rayonier during November, 1961, concerning Cleveland Jackson, and made no mention of any irregularities with respect to the Bumgarner Allotments or the logging contract. Are these the actions of a man who intends to repudiate as unauthorized a logging contract? Compare these actions with those of Polson in 1954, when an innocuous letter of intent, of which he did not approve, prompted a registered letter. The only conclusion that can be drawn from the above conduct is that Polson had no intention of repudiating the Rayonier-Jackson contract until long after the logging was completed, and that his decision to attempt it was an afterthought.

Further, even after Polson belatedly decided to question the contract, he was unwilling, even then, to completely repudiate the contract and take any chance on losing the contract proceeds if his treble-damage action against Rayonier should fail. So, after he commenced suit against Rayonier, he also sued the Jackson estate to obtain the contract proceeds as a hedge against the outcome of this treble-damage lawsuit. As is demonstrated by the settlement agreement, (Def. Ex. A-20-B) and the escrow

agreement (Def. Ex. A-20-A) the lawsuit against the Jackson estate was successful. In fact, Polson was so successful in obtaining the contract proceeds for his own benefit that the court allowed Rayonier to set off the \$20,000 it had paid against Polson's treble-damage judgment in this case. (F.F.&C.L. 5, R. 354)

With respect to the court's holding that: "Rayonier has not established Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances. . . ." (R. 335), it is submitted that Polson's conduct was not only unreasonable but inexcusable. Polson knew that L. J. Forrest was employed by Rayonier and he knew how to contact Forrest. (R. 136) By not picking up the telephone and telephoning Forrest—or anybody else at Rayonier—Polson allowed Rayonier to continue to cut the timber on the two Bumgarner Allotments and to incur a continuously increasing liability if the cutting was improper. For Polson to stand silently by and watch Rayonier incur such liability because of a claimed invalid contract made by the managing partner of the partnership; to watch Rayonier make payments of \$20,000 to the Jackson estate for the timber and \$2,000 to the Bureau of Indian Affairs for administering the timber, is to act in bad faith and is unreasonable under any circumstances.

With respect to the court's finding that "Rayonier has not established . . . that Polson's conduct misled or prejudiced Rayonier" (R. 335), it would appear to be self-evident that Polson's silence during the 18-month period could not avoid prejudicing Rayonier if, at the end of that time, he could then speak and repudiate the con-

tract. Polson now says that during the 18-month period, Rayonier incurred a liability of \$69,000 for cutting \$23,000 worth of timber in spite of having paid that full amount in accordance with the contracts of which Polson knew. If Polson had spoken during the six months from January, 1961, through July, 1961, and if Polson's claims are correct, Rayonier's loss and its potential liability for damages would have been substantially reduced. It should be kept in mind that over half the timber on Allotment 1679 was logged after February 1, 1961, that logging did not commence on Allotment No. 1678 until April 17, 1961, and that No. 1678 provided over 65 percent of the value of the timber removed. (Def. Exs. A-47 and A-48; R. 142) Less than \$4,000 worth of Joint Venture interest in timber had been removed by February 1, 1961 (Def. Ex. A-48, R. 166). If Polson had spoken when he and his attorneys first knew of Rayonier's activities, little or no timber would have been cut—or at least Rayonier would have proceeded at its peril.

Polson chose not to speak, because he had no thought of attempting repudiation until eighteen months after he had a copy of the contract and, by his own admission, knowledge of Rayonier's activities. Without question, Rayonier was substantially prejudiced by his silence.

Further, by not promptly advising Rayonier, Polson allowed the period for filing creditor's claims in the Jackson estate (R.C.W. 11.40.010) to expire approximately June, 1961. As a result, Rayonier did not have an opportunity to present a claim against the Jackson estate for any liability or damage it might have incurred as a result of the Rayonier-Jackson contract and the claim by Polson.

Affirmance of the Rayonier-Jackson Contract Resulted from the Demands by Polson Upon the Jackson Estate for the Contract Proceeds.

1. Polson ratified the Rayonier-Jackson contract by filing his creditor's claim in the Jackson estate.

In June, 1961, Polson filed a creditor's claim in the Cleveland Jackson estate. (Def. Ex. A-19-E) Item (d) of that creditor's claim makes a claim for all "monies received by deceased from the sale of timber situated upon [Joint Venture] lands. . . ." Polson testified at the trial that at the time he filed the creditor's claim, he suspected that the Jackson Estate had received monies from Rayonier for timber that had been cut and removed from the Bumgarner Allotments, (Tr. 126) and that:

" . . . I was aware that there had been a trespass, and there was money that was in evidence." (Tr. 125, ll. 15-17)

and:

" . . . there was some money in evidence and perhaps available . . . and we didn't have the exact accounting of it, and we couldn't get it, so we made a claim for it." (Tr. 126, ll. 8-11)

Research reveals only one instance where substantially the same question has been before the court. In *Miles v. Gadsden*, 139 S.C. 52, 137 S.E. 204 (1927), plaintiff's purported agent made an unauthorized collection of a mortgage payment from the defendant. The plaintiff then filed a claim with the administrator of the purported agent's estate for the payment that had been made on defendant's mortgage. At a later date, it was determined that the purported agent's estate was insolvent, and the plaintiff brought suit against the defendant for the amount

of the payment. The court, in upholding the report of the Master, held that the filing of the claim by the plaintiff in the purported agent's estate was a ratification of the payment that had been made by the defendant to the purported agent. This case and the rationale behind it is equally applicable to the instant case, for Polson would have had no basis upon which to file a claim against the Jackson Estate for the contract proceeds unless he considered them to be a joint venture asset and had no intention at that time of attempting to disavow the Rayonier-Jackson Contract.

2. Polson ratified the Rayonier-Jackson Contract by making a continuing demand on the Jackson Estate for payment to him of the proceeds.

In his deposition of September 15, 1965, Richard K. Bush, the attorney for plaintiff Polson, testified as follows:

(Witness Bush reading from his deposition at page 31, line 20)

“Q. Did you ever make demand or did anyone on your behalf ever make demand on either Mrs. Jackson or her attorney for those proceeds?

“A. I don't think that there was any formal, written demand made on her.

“Q. Was oral demand made upon her?

“A. Yes, oral demand was made, but I'm not sure exactly at what point, at what time.

“Q. What was the nature of the oral demand? Who made it? Where was it made?

“A. Well, I would be reasonably confident that I would have been the one to have made the demand. I don't think anyone else did. I think it would have been in Mr. Kirkwood's office. I think—I can't

tell you the time it was made. I don't think that Mr. Kirkwood—well, I don't know whether I have answered the question or not. I don't think that—I don't know what Mr. Kirkwood's response was. I don't think—I don't believe that he resisted the demand or felt that the money should not be paid over to us, but I do know that Mrs. Jackson indicated that she was not going to pay it over to us.

“Q. Would this demand have been made prior to July, 1961?”

“A. I am sure, no, because I'm sure we didn't know with any definiteness what money she had, if any. I'm not even sure that we knew at that time that she had any money from Rayonier with respect to this.

“Q. About when would it have been made? Would it have been made prior to the commencement of suit against Rayonier?”

“A. I'm sure that the first request for the — made was prior to that time, and I think that that is the point at which Mrs. Jackson indicated — whether she said that ‘I won't pay it to you,’ she did not pay it to us, and at some point she said she wasn't going to pay it to us.

“Q. And on whose behalf did you make this demand, Mr. Bush?”

“A. Well, I made the demand on behalf of Mr. Polson.

“Q. As his attorney?”

“A. As his attorney.” (Tr. 567-569)

and line 24 on page 34:

“Q. Is this when the demand was made, that we are referring to, or was it made prior to the time suit was commenced against Rayonier, or when?”

“A. Well, from the time that we first knew of the amount of money that had been paid to Mrs. Jackson, there were, I'd say — there was a standing

demand, really, for the payment of that money to us.” (Tr. 566)

Polson had no basis for demanding the payment to him of the proceeds unless he considered them to be a joint venture asset. By making a continuing demand for the proceeds, Polson ratified the Rayonier-Jackson Contract just as he ratified the contract when he filed his creditor’s claim in the Jackson Estate.

3. Polson ratified the Rayonier-Jackson contract by filing a lawsuit against the Jackson Estate for the contract proceeds.

On approximately February 15, 1963, Polson commenced a lawsuit against Anna Jackson, individually, and as Executrix of the Estate of Cleveland Jackson, in Grays Harbor Superior Court. A copy of the complaint is Def. Ex. A-20-D.²

Polson testified at trial that he considered the \$20,000 in proceeds to be the property of the Joint Venture and that he made the allegations in paragraph XI of the First Cause of Action on the basis that he, Polson, was entitled to have the funds paid to him pursuant to the 1951 Joint Venture Agreement, which is Pl. Ex. 2 (Tr. 135-6).

Paragraph XI describes as a joint venture asset the \$20,000 received by the Jackson Estate from Rayonier pursuant to the Rayonier-Jackson contract, which funds were then in existence and in the custody of the Executrix

2. It is stipulated that the references in Para. XI of the First Cause of Action (p. 4, Def. Ex. A-20-D) and Para. IV of the Second Cause of Action (p. 6, Def. Ex. A-20-D) to “the sum of Twenty Thousand Dollars (\$20,000), more or less,” refer to the payments that had been made by Rayonier to the Jackson Estate pursuant to the Rayonier-Jackson contract for timber cut and removed from the Bumgarner Allotments. (Tr. 132, 133 and 591)

of the Jackson Estate. In the first paragraph of the prayer of the complaint, (Def. Ex. A-20-D) Polson prayed for judgment against the defendant Anna Jackson as follows:

“1. That the assets of the joint venture of the plaintiff and the deceased, Cleveland Jackson, be adjudged, confirmed and set over to the plaintiff free and clear from any further right or claim of defendant, and defendant’s estate be adjudged to have no further interest in or claim against said joint adventurers;”

Further evidence of the fact that the lawsuit clearly involved a claim by Polson for the contract proceeds is the fact that the settlement agreement of the lawsuit (Def. Ex. A-20-B) makes a disposition of the contract proceeds.

That Polson ratified the Rayonier-Jackson contract by bringing suit for the proceeds is supported by Section 97, Restatement of Agency, Second, which section reads in part:

“§ 97. Bringing Suit or Basing Defense as affirmance.

“There is affirmance if the purported principal, with knowledge of the facts, in an action in which the third person or the purported agent is an adverse party:

“(a) brings suit to enforce promises which were part of the unauthorized transaction or to secure interests which were the fruit of such transaction and to which he would be entitled only if the act had been authorized; or . . .”

Comment “a” to Section 97 states:

“Comment:

“a. *Action against agent or other party.* The suit

may be against the other party for the purchase price of goods sold to him, or against the purported agent for money or other things received by him for the principal. The bringing of the suit or the basing of a defense in such cases is a manifestation of an election by the principal which, having been made, cannot be retracted. His intent to ratify is immaterial."

A similar question was presented to the court in *Newman v. Morgan*, 202 Ala. 606, 81 So. 548 (1919), which was a suit between the principal as plaintiff and his agent as defendant. The court held that by suing the agent for the proceeds of an allegedly unauthorized settlement made by the agent with a third party, the principal thereby ratified the defendant's acts. See also *Hart v. Maney*, 12 Wash. 266, 271, 40 Pac. 987, 988 (1895), where the court approved an instruction to the effect that plaintiff recognized the contract in question by suing the defendant for the value of the lumber that was delivered and consequently could not attempt to repudiate the contract and escape liability for a breach of contract.

By electing to bring an action against the Jackson Estate for the contract proceeds, Polson ratified the Rayonier-Jackson Contract, regardless of his intention to do so, just as he ratified the contract when he filed the creditor's claim and made demands for the proceeds.

4. Polson ratified the Rayonier-Jackson Contract by exercising dominion over the proceeds and accepting the benefit of the proceeds.

On March 13, 1963, John Kirkwood, the attorney for Anna Jackson, Executrix of the Jackson Estate, advised Bush by letter (Def. Ex. A-43) that Anna Jackson made no claim to the \$20,000 in proceeds from the Rayonier-

Jackson Contract, and offered to transmit the funds to Bush at that time.

Thereafter, a settlement was entered into between Polson and Anna Jackson, individually and as Executrix, of the lawsuit against the Estate. The settlement agreement (Def. Ex. A-20-B) provides that the \$20,000 proceeds received from Rayonier would be deposited in an irrevocable escrow account, with instructions to deliver the funds, together with interest thereon, to Polson in the event that he should dismiss this lawsuit or Rayonier should prevail.

The provision of the settlement agreement with respect to the contract proceeds was not requested by Kirkwood or Anna Jackson, but was a part of the settlement agreement prepared by Polson and presented to them. The Jackson Estate was making no claim to the funds at the time the settlement was made and the agreement executed. (Tr. 519, 520) Pursuant to the settlement agreement Bush prepared an escrow agreement, (Def. Ex. A-20-A; Tr. 594) which agreement was executed on June 18, 1963, by Polson, Anna Jackson and the National Bank of Commerce and provided for an irrevocable escrow of the contract proceeds. The agreement provided that in the event the present litigation was concluded with either a judgment for Rayonier or was dismissed without judgment, the contract proceeds would be delivered to Polson, and if the litigation was concluded with a judgment for Polson, the contract proceeds would be delivered to Anna Jackson.

One of the affirmative defenses presented by Rayonier was the question of whether it was entitled to setoff against any judgment the \$20,000 it had paid to the Jack-

son Estate. The trial court in one of its oral opinions held that "... under all the circumstances Rayonier should have a credit for that payment." (R. 354) Implicit in the court's ruling is the determination that Polson, by filing a creditor's claim, bringing suit against the Jackson Estate, settling the lawsuit and entering into the irrevocable escrow arrangement with respect to the proceeds, had exercised sufficient dominion over the proceeds that Rayonier was entitled to setoff the amount it had paid.

The general rule is stated in Section 98 of the Restatement of Agency, Second, as follows:

"§ 98. Receipt of Benefits as Affirmance

"The receipt by a purported principal, with knowledge of the facts, of something to which he would not be entitled unless an act purported to be done for him were affirmed, and to which he makes no claim except through such act, constitutes an affirmance unless at the time of such receipt he repudiates the act. If he repudiates the act, his receipt of benefits constitutes an affirmance at the election of the other party to the transaction."

The same general rule was recognized in Wahington in *McDougall v. McDonald*, 86 Wash. 334, 338, 150 Pac. 628, 629 (1915). There the court stated in a suit between the partners that where the defendant knew of an advance that was made by the plaintiff, and he knowingly participated in the use of the funds and never questioned the agreement until a completion of the contract, he must be held to ratify the contract. See also *Lemcke v. Funk & Co.*, 78 Wash. 460, 465, 139 Pac. 234, 236 (1914), where the court stated:

"It is elementary that a principal who, with knowledge, accepted the benefits of a transaction conduct-

ed by an assumed agent, is deemed to have ratified it *in toto*.”

Polson, by virtue of the settlement agreement and the irrevocable escrow agreement, received the benefit of something to which he was not entitled unless the Rayonier-Jackson Contract was, in fact, a valid contract. If the Rayonier-Jackson contract was unauthorized, the proceeds belonged to Rayonier, not to Polson or the Jackson Estate. It is obvious that there was no intention on Polson’s part to preserve the funds for Rayonier as they were to be returned to the Jackson Estate in the event that Polson was successful in his lawsuit.

It is submitted that Polson exercised full dominion over the contract proceeds and received their benefit at the time that he entered into the settlement of his lawsuit. In fact, it was the denial of his right of full and complete dominion over the proceeds that is the very basis of his allegations in paragraph XI of the First Cause of Action, and paragraph IV of the Second Cause of Action in his complaint.

PART III.

Regardless of Jackson’s Authority, Polson Is Estopped to Deny the Validity and Enforceability of the Rayonier-Jackson Contract or to Recover More Than Single Damages. (Specifications of Error 1.1, 1.2.2, 1.2.5, 1.2.8, 2.8, 2.10, 5.1)

Definition of Estoppel

Estoppel is fundamentally a doctrine that operates by creating a liability, by denying a cause of action which might otherwise accrue, or by creating a defense to an action. It may result from misrepresentation or, within

a limited area, from a failure to reveal facts. "The situations in which estoppel works are limited by the peculiar procedural way in which it operates, that is, by preventing the one against whom it operates from pleading the truth." Comment "a" to Section 8B, Restatement of Agency, Second.

Statement of the General Rule

Section 8B, Restatement of Agency, Second, sets forth the general rule as follows:

"§ 8B. Estoppel—Change of Position

"(1) A person who is not otherwise liable as a party to a transaction purported to be done on his account, is nevertheless subject to liability to persons who have changed their positions because of their belief that the transaction was entered into by or for him, if

"(a) he intentionally or carelessly caused such belief, or

"(b) knowing of such belief and that others might change their positions because of it, he did not take reasonable steps to notify them of the facts. . . .

"(3) Change of position, as the phrase is used in the restatement of this subject, indicates payment of money, expenditure of labor, suffering a loss or subjection to legal liability."

For example, in *Harms v. O'Connell Lumber Co.*, 181 Wash. 696, 44 P.2d 785, 787 (1935), the court was considering a situation where Mrs. Harms allowed the defendant to construct approximately \$2,500 worth of railroad tracks on her land. The defendant had title to the timber upon her land under a deed which required removal within a reasonable time, and that time had apparently passed. In holding that Mrs. Harms was estopped

to raise the question of expiration of defendant's rights under the deed, the court stated:

"If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent. This rule of estoppel is applicable where the owner of property stands by and knowingly permits another to expend money upon it by making improvements, erecting buildings, and the like." (p. 700)

Polson Is Estopped by His Silence to Question the Validity of the Rayonier-Jackson Contract.

In the present case, Polson is estopped by reason of his silence, when he knew that Jackson had executed the Addendums (Exs. 9 and 10) and the Rayonier-Jackson contract; that Rayonier would expend considerable sums of money in connection with the preparation for the logging of the Bumgarner Allotment, including the building of roads; that Rayonier would proceed to log the Bumgarner Allotments and would expend considerable sums of money in connection with that operation; that Rayonier would make and was making substantial payments to the Executrix of the Jackson Estate pursuant to the Rayonier-Jackson contract; and that Rayonier would make substantial payments to the Bureau of Indian Affairs for administrative services pursuant to the Addendums to the contract. In addition, if in fact Polson intended to disavow the Rayonier-Jackson contract, he knew that each day that he delayed in asserting to Rayonier that Jackson did not have authority would result in additional prejudice as it would create (according to Polson's theories and claims) a potential liability of three times the actual value for each tree that was cut by

Rayonier while he remained silent. There is no question that Rayonier "changed its position," as that term is defined in the Restatement.

Polson had known L. J. Forrest for over 25 years, had been his good friend for 20 years, at all times knew that Forrest was employed by Rayonier and knew how to contact Forrest, although not immediately or within any specific limited period of time. (R. 135, 136, 31-5)

In assessing whether Polson should be estopped for his failure to speak under these circumstances for 18 months after he admits he had a copy of the Rayonier-Jackson contract, comment "d" to Section 8B of the Restatement of Agency, Second, is relevant. This comment says in part:

"Extent of duty to give information. When one realizes that another is or may come under a misapprehension as to the authority of his agent or the ownership of his property,—a misapprehension for which he is not at fault,—his duty to give information is a duty of due care. It is proportioned to the likelihood of harm and to its extent. If only a specific third person is involved, the duty of the purported principal can frequently be discharged by an inexpensive letter or telephone message . . . All that can be stated is that the action required is that which would be taken by a reasonably prudent business man, with the normal regard for the interests of others and his own reputation."

Treble damages under the provisions of either R.C.W. 64.12.030 or R.C.W. 64.12.020 are not appropriate where the owner of the timber knows of the logging and takes no action. The Washington Supreme Court has stated in a number of cases that one of the three purposes of the

timber trespass statutes is to discourage a person from intentionally making the owner of timber an unwilling seller. See *Guay v. Washington Natural Gas Co.*, 62 Wn. 2d 473, 476, 383 P.2d 296, 299 (1963). This purpose is only fulfilled if the owner is not aware of the trespass until after it has been completed. If an owner is aware of the logging of his timber and does and says nothing, *he is no longer an unwilling seller, he is a willing seller.* If one by silence permits the logging of his timber, then the purpose and intent of the punitive treble damages provision of the trespass and waste statutes would be abused if he is not then estopped from claiming the benefits of the statutes.

PART IV

Rayonier, as a Purchaser from Nina Bumgarner, a Cotenant of Polson, Could Not Have Committed Either Statutory Trespass or Waste. (Specifications of Error 1.2.1, 1.2.3, 1.2.4, 1.2.6, 1.2.8, 1.3, 2.1, 2.3, 2.4, 2.5, 2.6, 5.1)

The Rayonier-Bumgarner Contracts Are Valid and Enforceable Contracts.

On July 24, 1959, the Superintendent sent timber contracts covering Nina Bumgarner's interest in the two Bumgarner Allotments to Rayonier. (Ex. 99) On August 26, 1959, Rayonier forwarded executed timber contracts (Pl. Exs. 13 and 14) on the two Allotments to the Superintendent for approval. (Ex. 102) Thereafter, on August 27, 1959, John W. Libby, as Acting Superintendent, approved the contracts and wrote Rayonier (Ex. 103), forwarding the approved contracts.

On October 12, 1959, C. W. Ringey, Superintendent,

wrote to Rayonier in response to its letter of October 8, 1959. (Ex. 108) In this letter, Ringey referred to the fact that Nina Bumgarner's one-half interest in the two Allotments had recently been included under the Crane Creek Contract and acknowledged the fact that he was aware at that time that Rayonier had not yet entered into a contract with Cleveland Jackson with respect to logging of the other undivided one-half interest in the two Bumgarner Allotments.

The court entered findings to the effect that Nina Bumgarner executed the powers of attorney (Exs. 7 and 8) that she was legally competent to do so, and executed the powers of attorney voluntarily and not under duress, coercion or fraud, and that the powers of attorney remained in full force and effect and unrevoked from March 11, 1959, to the date of commencement of the lawsuit. The court found that the Crane Creek Contract is a valid and enforceable contract, and that pursuant to the Crane Creek Contract and the General Timber Sale Regulations that are appended to the contract, Rayonier submitted to the Portland Area Director of the Bureau of Indian Affairs proposed logging plans for 1961, which plans included portions of the Bumgarner Allotments and were approved by the Director. The court further found that Rayonier's road construction and logging operations on the Bumgarner Allotments were conducted pursuant to and in accordance with the logging plans that were approved by the Portland Area Director and were in accordance with the Crane Creek Contract, and that all live timber that was cut and removed by Rayonier from the Bumgarner Allotments have been marked

or otherwise designated for cutting by the officer in charge as required by the General Timber Sale Regulations that are appended to the Crane Creek Contract. (R. 141, 142, 334)

The court made the further finding that there was no fraud, coercion or duress in connection with the execution and approval of the Rayonier-Bumgarner contracts by John W. Libby, as Acting Superintendent, that the Rayonier-Bumgarner contracts have not been revoked, rescinded or terminated by any of the parties, and that John W. Libby was the Acting Superintendent on August 27, 1959, and, as Acting Superintendent, was authorized to execute the Rayonier-Bumgarner contracts on behalf of Nina Bumgarner and to approve said contracts as Superintendent. (R. 142, 334)

The court, however, made a further finding that "Mr. Libby did not have the authority to authorize a contract without procuring the approval of Polson, which approval was not obtained." (R. 335) It is not clear from the court's opinion what effect, if any, is to be given to this finding.

John W. Libby testified at trial that the only condition to his approval of the Rayonier-Bumgarner contracts was the execution by Jackson of the Addendums. (Tr. 411-12) From the factual background as outlined in the Statement of Facts, Libby was certainly entitled to rely on Jackson's authority to execute the Addendums. In brief, Libby had been negotiating with Jackson and with Beau-lieu for approximately ten years with respect to either partitioning or logging the Bumgarner Allotments. When-

ever he made an inquiry with respect to the Allotments, he was directed by Beaulieu to Jackson. It was certainly reasonable after the Indian Agency received Jackson's letters of May 15, 1959 (Ex. 93) and June 18, 1959 (Ex. 95) and Beaulieu's letter of June 18, 1959 (Ex. 96) for Libby to conclude that Jackson was authorized to execute the Addendums. (Exs. 9 and 10)

In the court's oral opinion of March 11, 1966, the court stated that ". . . I think the proof presented and the facts found [are] sufficient to establish on both [trespass and waste]." (R. 351) In addition, in his April 25, 1966 oral opinion, the court held that in the event it was determined on review that trespass does not lie, that waste will lie. (R. 361) The only way that Rayonier could have committed waste was as a cotenant of Polson and the only basis upon which it could have been a cotenant was by virtue of its status as purchaser under the Rayonier-Bumgarner contracts. Therefore, it is obvious from the court holdings that he did not consider his statement on Libby's authority as affecting the status of the Rayonier-Bumgarner contracts.

In addition, regardless of Libby's authority, C. W. Ringey, the Superintendent of the Western Washington Indian Agency, stated his approval of the Rayonier-Bumgarner contracts when he wrote to Rayonier on October 12, 1961. (Ex. 108) Furthermore, any inference from the court's statement that the Rayonier-Bumgarner contracts were not valid, enforceable and binding contracts is inconsistent with the holding by the court that Rayonier's road construction and logging operations on the Bumgarner Allotments were conducted pursuant to and

in accordance with the logging plans approved by the Portland Area Director and in accordance with the Crane Creek Contract. (R. 141, 334)

Although it is conceivable that either Nina Bumgarner or the Bureau of Indian Affairs could attempt to rescind the contracts on the basis of a mistake of fact with respect to Jackson's authority to execute the Addendums, the court found that none of the parties to the Rayonier-Bumgarner contracts had done so. As the parties have made no attempt to rescind or revoke the contracts, what conceivable standing does Polson have, a person not a party to the contracts, to question whether or not the Superintendent could have made a mistake of fact when he approved the contracts.

Rayonier as Purchaser Under the Rayonier-Bumgarner Contracts Could Not as a Matter of Law Commit a Trespass on the Bumgarner Allotments

The Washington Timber Trespass Statute R.C.W. 64.12.030¹ is one of several alternatives available to a landowner who claims damages as the result of an allegedly unauthorized cutting of timber on his real property. Other remedies include action for common law trespass, replevin, conversion and implied contract. *Bill v. Gattavara*, 34 Wn.2d 645, 209 P.2d 457 (1949). How-

1. 64.12.030 Injury to or removing trees, etc.—Damages. Whenever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub on the land of another person, or on the street or highway in front of any person's house, village, town or city lot, or cultivated grounds, or on the commons or public grounds of any village, town or city, or on the street or highway in front thereof, without lawful authority, in an action by such person, village, town or city against the person committing such trespasses or any of them, if judgment be given for the plaintiff, it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be.

ever, it is submitted that statutory trespass will not lie in this lawsuit as the timber has been cut by the defendant Rayonier under license from Nina Bumgarner, the cotenant of the Polson-Jackson joint venture.

The commission of a trespass by the defendant is one of the prerequisites for recovering damages under R.C.W. 64.12.030 for the statute refers to the penalized conduct as "trespasses." The Washington legislature in adopting the precursor to R.C.W. 64.12.030 used the word "trespass" in its common law sense, for in describing which trespasses are to be penalized, the legislature used language very similar to that which has been employed by the courts in defining common law trespass. For example, the Washington Supreme Court has said that common law trespass:

"... signifies no more than entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property." *Welsh v. Seattle and Montana R. Co.*, 56 Wash. 97, 99, 105 Pac. 166 (1909).

It would follow that unless there has been a trespass in the sense that the word "trespass" was defined at common law, the remedy created by R.C.W. 64.12.030 was not intended to be available.

It might be argued that the statute is not dependent upon the common law definition as the statute itself defines what is meant by trespass, i.e., "cutting timber on another person's land without lawful authority." The answer is obvious, for a cotenant who cuts timber on commonly owned property is cutting on his own land, not on the "land of another person." The only two courts

who considered the question under similar statutes so concluded, stating that "the statute was [not] intended to apply to a cotenant." *Buchanan v. Jencks*, 38 R.I. 443, 96 Atl. 307, 311 (1916), and that the statute "has no application to a case where the timber is cut by an owner of an interest in the land." *Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8, 9 (1922).

In order to prevail, plaintiff has to argue that this statute creates a cause of action for trespass in one cotenant against the other cotenant or his licensee for cutting timber on the cotenancy. Such an action did not exist at common law and to so hold would ignore the statutory language "on the land of another," and would be contrary to the admonition of the Washington Supreme Court that the statute is penal in nature and must be strictly construed. *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720 (1911). The only reasonable interpretation of the statute is that it creates the statutory remedy for certain common law trespasses which, of course, are by necessity described in the statute. Trespass is a prerequisite and where trespass would not lie at common law, the treble damage remedy is not available.

At common law an action for trespass would lie between cotenants only where one cotenant has ousted the other cotenant or where he had destroyed the commonly owned property. The question of whether it is possible for trespass to lie between cotenants has not been squarely presented to the Washington court. Two Washington decisions are helpful, however. In *McKnight v. Basilides*, 19 Wn.2d 391, 143 P.2d 307 (1943), and *McGill v. Shugarts*, 58 Wn.2d 203, 361 P.2d 645 (1961), it is stated as a general rule that:

"... the entry of a cotenant on the common property even if he takes the rents, cultivates the land, or cuts the wood and timber without accounting or paying for any share of it, will not ordinarily be considered as adverse to his cotenants and an ouster of them." 58 Wn.2d 204, 361 P.2d at 646.

The question has been squarely presented in two jurisdictions with timber trespass statutes similar to Washington's. *Buchanan v. Jencks*, 38 R.I. 443, 96 Atl. 307 (1916), was a suit for double and treble damages for timber trespass brought by four of the five cotenants against a license of the fifth cotenant.²

In construing the statute, the Rhode Island Supreme Court said:

"It will be observed that this statute penalizes a defendant who shall without leave commit a trespass on the land of another person. We do not think that this statute was intended to apply to a cotenant, or his licensee, who had a right to enter upon the land and to avail himself of its benefits and revenue, but was designed to protect the owners of land from the invasion of those who were strangers to the title." 96 Atl. at page 311.

The court discussed the question of whether the cutting of merchantable timber by one cotenant on the common property could ever amount to a trespass. It acknowledged the rule that a tenant in common may become a trespasser if his conduct amounts to an ouster of his cotenants or a destruction of the common property. But,

2. The Applicable Statute Provided:

"Section 1. Every person who shall cut, destroy, or carry away any tree, timber, wood, or underwood whatsoever, lying or growing on the land of any other person, without leave of the owner thereof, shall, for every such trespass, pay the party injured twice the value of any tree so cut, destroyed, or carried away; and for the wood, or underwood, thrice the value thereof; to be recovered by action of trespass." 96 Atl. at page 311.

said the court:

“We do not find anything in the evidence showing an ouster of the plaintiffs. So far as appears, they were in no way prevented by the defendant or by Thayer [his licensor] from entering upon the premises and cutting and removing timber and wood had they seen fit to do so, and we do not think that the sale, cutting, and removal of matured timber and wood amounts to a destruction of the property which the law contemplates.” 96 Atl. at page 310.

Fitzhugh v. Norwood, 153 Ark. 412, 241 S.W. 8 (1922), involved a statutory timber trespass action brought by one tenant in common against another under an Arkansas statute.³

In reversing a judgment for the plaintiff, the court said:

“We are of the opinion that the statute quoted above has no application to a case where timber is cut by the owner of an interest in the land. The statute authorizes the recovery of damages for trespass committed by a stranger. On land owned by several persons as tenants in common, neither of the owners is a trespasser.” Id. 241 S.W. at page 9.

Many other cases have held that a tenant in common cannot be treated as a trespasser for cutting timber on the commonly owned property. In *Kirby Lumber Co. v. Temple Lumber Co.*, 125 Texas 294, 83 S.W.2d 638

3. The Statute Provided:

“If any person shall cut down, injure, destroy or carry away any tree placed or growing for use or shade, or any timber, rails, or wood, standing, being or growing on the land of another person, or shall dig up, quarry or carry away any stone, ground, clay, turf, mold, fruit or plants, or shall cut down or carry away, any grass, grain, corn, cotton, tobacco, hemp or flax, in which he has no interest or right, standing or being on any land not his own, or shall willfully break the glass, or any part of it, in any building not his own, every person so trespassing shall pay the party injured treble the value of the thing so damaged, broken, destroyed or carried away, with costs.” Id., 241 S.W.2d at page 9.

(1935), at page 645, the Supreme Court of Texas said:

“We are inclined to the view that where one cotenant merely cuts and appropriates more than his share of the standing timber on land owned jointly by himself and others, he cannot be charged by the other joint owners with the manufactured value of such excess timber, for in cutting the timber he makes no unusual use of the real estate of which he is a tenant in fee, and he cannot be classed as a trespasser.”

See also *Kane's Adm'r v. Garfield's Adm'r*, 60 Vt. 79, 13 Atl. 800 (1888); *Gulf Red Cedar v. Crenshaw*, 188 Ala. 606, 65 So. 1010 (1914); *Filbert v. Hoff*, 42 Pa. 102, 82 Am. Dec. 493 (1862); *Jones v. McBee*, 222 N.C. 153, 22 S.E.2d 226 (1942); *Alford v. Bradeen*, 1 Nev. 228 (1865); *Hastings v. Hastings*, 110 Mass. 280 (1872).

The general rule with respect to licensing a third party to cut timber is stated in *Freeman on Cotenancy and Partition*, Sec. 253:

“By either lease or license, a joint tenant, copartner, or tenant in common, may confer upon another person the right to occupy and use the property of the cotenancy as fully as such lessor licensor [sic] himself might have used or occupied it if such lease or license had not been granted. If either cotenant expels such licensee or lessee, he is guilty of trespass. . . . Whenever either of the cotenants may lawfully cut or remove trees, he may authorize another to do so.”

In *Buchanan v. Jencks*, 38 R.I. 443, 96 Atl. 307 (1916), in considering the question of whether a cotenant could license a third person to cut timber on the common property, the court said at page 309:

“We see no reason why a cotenant in the enjoyment of his rights as such cannot authorize another to do whatever he might lawfully do himself. A con-

trary view, if followed to its logical conclusion, would restrict a cotenant's enjoyment of the common property to the sphere of his own personal activities, and would deprive him of the aid of others whom he might desire or need to employ."⁴

The defendant has been unable to find any case where a licensee has been treated as a trespasser with respect to nonconsenting cotenants. On the other hand, there is authority that a licensee who is on the cotenancy with the authority of one but not all of the defendants cannot be held in trespass. In *Williams v. Bruton*, 121 S.C. 30, 113 S.E. 319 (1922), it was held that a grant of a right of way to a licensee from one cotenant without the consent of the other would absolve the licensee from liability as a technical trespasser although it would not absolve him from liability to the cotenants for any injury to the cotenancy. For the general proposition that a licensee cannot be treated as a trespasser see also *Dinsmore v. Renfroe*, 66 Cal. App. 207, 225 Pac. 886 (1924); *Harris v. City of Ansonia*, 73 Conn. 359, 47 A. 672 (1900); and *DeLa Pole v. Lindley*, 131 Wash. 354, 230 Pac. 144 (1924), where the Washington court refused to treat a lessee as a trespasser even though his lease extended to all of the cotenancy and had not been authorized by one of the cotenants, the court indicating that the lessee would be considered a tenant in common with the nonconsenting cotenant.

4. For other cases supporting this proposition, see *Baker v. Wheeler*, 8 Wendell 505, 24 Am. Dec. 66 (1832); *Alford v. Bradeen*, 1 Nev. 228 (1865); *Jasper Land Co. v. Manchester Sawmills*, 209 Ala. 446, 96 So. 417 (1923); *Hocksprung v. Stevenson*, 82 Mont. 222, 266 Pac. 406 (1928) (a mining case); *Sullivan v. Sherry*, 111 Wis. 476, 87 N.W. 471 (1901); *Dinsmore v. Renfroe*, 66 Cal. Appeals 207, 225 Pac. 886 (1924) (which is not a timber case but which is frequently cited for the proposition that a cotenant can license a third party to operate on the cotenancy).

Rayonier, Pursuant to the Rayonier-Bumgarner Contracts, May Have Rights Greater Than Those of a Licensee

In the preceding portion of this brief, defendant assumed for the purpose of argument that Rayonier was the licensee of Nina Bumgarner with respect to the timber on the Bumgarner Allotments. However, Rayonier as a purchaser under the contracts with Nina Bumgarner may have greater rights than those of a licensee. See *Hitchcock v. Frank*, 63-1 U.S.T.C., para. 9497; *Barclay v. U.S.*, 333 F.2d 847 (Ct. Cl. 1964) and *Guistina v. U.S.*, 313 F.2d 710 (9th Cir. 1963). Whether or not Rayonier would be characterized as a tenant in common with the Polson-Jackson Joint Venture in the timber on the Allotments is open to serious question.

However, if Rayonier was a tenant in common with the Polson-Jackson Joint Venture, then any legal question concerning the licensee's liability in trespass would be irrelevant. There would seem to be no question but what the parties could be cotenants as to the timber. In *DeLa Pole v. Lindley*, 131 Wash. 354, 230 Pac. 144 (1924), a lessee of one cotenant's interest in a cotenancy was treated as a tenant in common with the other cotenants, and in *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123 (1902), the court recognized the existence of a tenancy in common in a mining claim. In addition, as a cotenant Rayonier could not have committed a trespass under provisions of R.C.W. 64.12.030 for the reason that it would not have been on the land of another without lawful authority.

Rayonier Did Not Commit Waste

If Rayonier is held to be a cotenant of the Polson-Jackson Joint Venture, then the plaintiff will argue that Rayonier committed waste under the provisions of R.C.W.

64.12.020 when it cut and removed the timber from the Bumgarner Allotments.⁵ The plaintiff will concede that the waste statute does not apply to tenants in common in fee as it is applicable only to "tenant[s] in severalty or in common of real property for life or for years. . . ." *Graffell v. Honeysuckle*, 30 Wn.2d 390, 395, 191 P.2d 858, 861 (1948). If Rayonier is a tenant in common with Polson with respect to the timber on the Bumgarner Allotments, it clearly is a cotenant in fee, for its right to the timber is absolute, subject only to being divested of its interest in the timber if it is not cut and removed prior to the expiration of the Crane Creek Contract (1986). As such, Rayonier's estate in the timber would be that of a fee simple determinable, which is an estate that has all of the attributes of a fee simple except that it is subject to being defeated by the happening of a condition. See *King County v. Hanson Investment Co.*, 34 Wn.2d 112, 118, 208 P.2d 113, 117 (1949). Although the Washington court has not passed upon the question of the nature of the interest acquired pursuant to a timber contract, the court did state in *Colman v. Layman*, 41 Wn.2d 753, 757, 252 P.2d 244, 246 (1953), that such an estate "possibly may be said to have the characteris-

5. 64.12.020 Waste by guardian or tenant, action for. If a guardian, tenant in severalty or in common, for life or for years, or by sufferance, or at will, or a subtenant, of real property commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant or subtenant; in which action, if the plaintiff prevails, there shall be judgment for treble damages, or for fifty dollars, whichever is greater, and the court, in addition may decree forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. The judgment, in any event, shall include as part of the costs of the prevailing party, a reasonable attorney's fee to be fixed by the court. But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice.

tics of a determinable estate, with the possibility of reverter in plaintiffs, subject to a special limitation, rather than of an estate subject to a condition subsequent." See also *Heybrook v. Beard*, 75 Wash. 646, 649, 135 Pac. 626 (1913). In any event it is clear that the interest acquired is not that of a "tenant for years" and that the waste statute, R.C.W. 64.12.020, is inapplicable to this action.

PART V

In the Event a Trespass Occurred, Only Single Damage Should Have Been Awarded. (Specifications of Error 1.2.5, 1.2.8, 2.7, 5.1)

Under the circumstances of this case, if plaintiff is to prevail, only single damages should be awarded under the provisions of R.C.W. 64.12.040, which provides:

"*Mitigating circumstances—Damages.* If upon trial of such action it shall appear that the trespass was casual or involuntary, or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, . . . judgment shall only be given for single damages."

The Washington court has had the opportunity to comment on a number of occasions with respect to the subjective test to be applied to determine whether a defendant is liable for penal damages.

In *Tronsrud v. Puget Sound Traction, Light & Power Company*, 91 Wash. 660, 158 Pac. 348 (1916) the Supreme Court, in denying treble damages, said:

" . . . It would be misusing this law [the treble damage law] to visit upon the mistaken a penalty intended for the wanton." 158 Pac. at 349.

See also *Blake v. Grant*, 65 Wn.2d 410, 379 P.2d 843

(1964); *Grays Harbor County v. Bay City Lumber Company*, 47 Wn.2d 879, 887, 289 P.2d 975, 980 (1955); *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948); and *Gardner v. Lovegren*, 27 Wash. 356, 359, 67 Pac. 615, 616 (1902) where the court approved the following instruction:

“ . . . if you find that the defendant went upon the plaintiff's land in good faith in the honest and sincere belief that the land was their own, or that their going upon the plaintiff's land was not marked by any spirit of wantonness, wilfullness or evil design, then you must find that the defendant's action was not wilful. In other words, before you can determine that the defendant's action was wilful, the preponderance of the testimony must satisfy you that the trespass was not only against the consent of the plaintiff, but that it was intended by circumstances of bad faith and intentional wrong on the part of said defendant.”

Rayonier logged the Bumgarner Allotment at the urging of the Indian Agency to give immediate financial relief to an elderly Indian lady, and only after it had entered into contracts with Nina Bumgarner, approved by the Superintendent, and with Cleveland Jackson, the managing partner of the Joint Venture. Even if it should be determined that Jackson did not have authority to execute the Rayonier-Jackson contract, Rayonier's conduct, under the facts of this case, cannot be characterized as “wanton,” “wilfully,” “reckless disregard” or “evil design.” Accordingly, if a trespass occurred, only single damages should have been awarded.

PART VI

At Most, the Amount of Polson's Recovery Must Be Limited to the Interest That Polson Had in the Joint Venture Assets or Profits, Exclusive of Jackson's Interest. (Specifications of Error 1.2.7, 1.2.8, 5.1)

Jackson had no rights against Rayonier

Neither Jackson nor Jackson's Estate had any rights against Rayonier with respect to the logging on the Bumgarner Allotments, as Rayonier paid to the Jackson Estate the full amount called for by the Rayonier-Jackson contract and the contract had been executed by Jackson. Certainly neither Jackson nor Jackson's Estate would be allowed to claim that the contract was unauthorized and sue for single damages, much less treble damages. Polson took an assignment of Jackson interest (Def. Ex. A-20-B) and cannot collect what Jackson or Jackson's Estate could not have collected from Rayonier, for an assignee takes no greater rights than those possessed by the assignor. See *Paullus v. Fowler*, 59 Wn.2d 204, 212, 367 P.2d 130 (1961); *Phelps v. Kroll*, 211 Iowa 1097, 235 N.W. 67 (1931); 4 *Corbin on Contracts*, Sec. 892, at p. 585.

As will be demonstrated, Jackson (and his Estate) had either a one-half interest in the assets or in the profit from each sale.

Jackson Had a One-Half Interest in the Partnership Assets

Prior to Jackson's death, one-half of the partnership interest in the Bumgarner Allotments was owned by Jackson and one-half by Polson. Upon Jackson's death, his estate succeeded to his one-half interest, which interest was later assigned to Polson. Under the 1951 Joint Venture Agreement (Pl. Ex. 1) Polson was to furnish all funds for the purchase of property and Jackson was to give Polson his promissory note for one-half of the purchase price of each purchase, payable out of the proceeds from the subsequent sale or logging of the particular parcel of property.

When the Joint Venture acquired an undivided one-

half interest in the Bumgarner Allotments for \$4,350, Jackson accordingly gave Polson his promissory note in the amount of \$2,175 for his one-half of the purchase price. This note is page 2, Pl. Ex. 3.

Thus, under the 1951 agreement, Polson contributed directly to the partnership one-half of the funds to purchase a particular parcel of property. The other half of the necessary funds was loaned by Polson to Jackson on an individual obligation of Jackson to Polson to be evidenced by a promissory note. In turn, the money borrowed by Jackson from Polson was contributed by Jackson to the partnership completing the sum needed to purchase the particular investment. Polson thereby owned a one-half interest in the partnership and its assets and Jackson owned the other half. As stated in *McDonald v. McDonald*, 119 Wash. 396, 405, 206 Pac. 23, 26 (1922):

“It is true the money loaned was borrowed for the use of the partnership and was used in the partnership business, but the respondent, by signing the note as maker, became individually responsible for the payment of the note. In other words, the parties dealt as strangers to the partnership relation, and by their act isolated the transaction from the general partnership account.”

As Polson and Jackson had equal shares in the partnership and the contributions to the partnership, they also had equal shares in any partnership assets. See R.C.W. 25.04.240. Therefore, one-half of the partnership interest in the timber cut and removed by Rayonier from the Bumgarner Allotments belonged to Jackson (or the Jackson Estate), and one-half to Polson and Polson's recovery, if any, should have been limited to his one-half interest, not the full interest as awarded by the court. (R. 353)

Alternatively, Jackson Had a One-Half Interest in the Profits

As an alternative argument, and even assuming that Jackson's interest in the partnership assets was limited to one-half of the profit, it still follows that of the \$69,000 trebled damages awarded by the court, approximately \$31,550 would have belonged to Jackson (or the Jackson Estate) and \$31,550 would have belonged to Polson, prior to the assignment of the Jackson Estate's interest to Polson.

Under paragraph 4 of the 1951 agreement, each investment is to be dealt with according to the terms of the agreement. Those terms require that Polson be reimbursed for his contribution to the partnership and his contribution to Jackson, which latter sum was also contributed to the partnership by Jackson. Following such reimbursement of Polson for the money placed in the partnership by him and for the money loaned by him to Jackson to contribute to the partnership, the remaining portion or profits were to be divided equally by Jackson and Polson.

It is clear from the Joint Venture Income Tax Return (Def. Ex. A-45) that was filed by Polson that one-half of the net profit from each investment was treated as income to Jackson and one-half as income to Polson. This same approach was used by Polson in the accounting that he filed in the Jackson Estate. (Def. Ex. A-19-D)

Therefore, for the purpose of determining Jackson's (or the Jackson Estate's) share of the profits from the cutting of timber by Rayonier on the Bumgarner Allotments, there must be subtracted from the potential recovery of \$23,000 trebled the costs to the partnership. These costs are: (a) the cost of purchasing the Bumgarner Allotments (\$4,350), and (b) other costs incurred

by the partnership in connection with the investment (35%¹ of the purchase price, or approximately \$1,550), or a total debit of \$5,900. Subtracting the total debits from the potential recovery of \$69,000, the partnership was left with profits in the amount of \$63,100.

Accordingly, the Jackson Estate's interest would have been one-half of the profits, or \$31,550, and, conversely, Polson's one-half interest in the profits is \$31,550, and his recovery, if any, should have been limited to that amount.

1. The 35% factor was used by Polson in his accounting in the Jackson Estate. See Def. Ex. A-19-D at pp. 8-10.

PART VII

The Plaintiff Is Not Entitled to Interest Under Washington Law. (Specifications of Error 1.2.6, 1.2.8, 5.1)

The Washington court has not passed upon the question of interest in actions of trespass or injury to real or personal property.¹ However, in several cases involving damage or destruction to personal property, the court has held that interest is not allowed since the damages are unliquidated. See *Mojonnier & Sons v. Railway Express Agency*, 52 Wn.2d 569, 573, 328 P.2d 167, 169 (1958); *Lamb v. Railway Express Agency*, 51 Wn.2d 616, 619, 320 P.2d 644, 646 (1948); *Jellum v. Grays Harbor Fuel Co.*, 160 Wash. 585, 593, 295 Pac. 939, 941 (1931); and *Phifer v. Burton*, 141 Wash. 186, 251 Pac. 127, 128 (1926).

Furthermore, the general rule allowing interest in tres-

1. According to 36 A.L.R.2d 337, 397-398, Sec. 32, the general rule is that in actions of trespass for injury to or destruction of real or personal property, interest may be allowed as part of the damages. Whether, and the extent to which, interest is allowed in waste actions, has been decided in only two old cases, one in West Virginia and one in England. See 36 A.L.R.2d 337, 492, Sec. 79. Washington, however, does not follow the general rule.

pass actions does not apply where the trespass or waste cause of action is for statutory treble damages.

In *McCloskey v. Ryder*, 138 Pa. 383, 21 Atl. 150 (1891), the plaintiff was seeking treble damages for the defendant's action in cutting timber on plaintiff's property. The Supreme Court of Pennsylvania held that the trial court was correct in trebling the damages and not allowing any interest to be given to the plaintiff. No interest was allowed either on the trebled amount or on the single damage amount. The court stated (at p. 151):

"The treble damages are given as a penalty, and we know of no case in which a penalty bears interest until the plaintiff's right to it has been settled by judgment. The learned judge of the court below was right, therefore, in excluding the interest, and entering the judgment for three times the single value of the trees cut and carried away."

In addition, the Washington court has commented on the question in dictum. In *Blake v. Grant*, 65 Wn.2d 410, 397 P.2d 843 (1964), a trespass case for removal of timber was before the court. The case involved treble damages. Judgment was given for the plaintiff at the trial court and interest was allowed on the trebled amount of damages from the time of trespass. The Supreme Court made the following statement:

"In the instant case, the trial court allowed the interest from the date of conversion upon the punitive two-thirds portion of the award as well as the compensatory one-third part. It is recognized that the *Grays Harbor* case, [289, P.2d 975] *supra*, was not an action for treble damages; that our statutory action for treble damages is in the nature of a penalty [citing cases], and that interest is generally disallowed on punitive damages. 15 Am. Jur., Damages Sec. 299, p. 740. However, since counsel for the appellants has not presented this point, and the amount

involved is very small, we do not decide the question.” 65 Wn.2d at 413, 379 P.2d at 844-5.

15 Am. Jur., *Damages*, Sec. 299, p. 740, cited in the above Washington case states:

“Interest is not recoverable in statutory actions for double to treble damages.” [Citing cases]

Both R.C.W. 64.12.030 and R.C.W. 64.12.020 are penal statutes. In neither statute is interest suggested and, not being specifically provided for, should not be allowed. As stated in *Bailey v. Hayden*, 65 Wash. 57, 117 Pac. 720 (1911), the trespass treble damage statute is “penal in nature, not merely remedial. As such it should be strictly construed.” 65 Wash. at p. 61, 117 Pac. at p. 721.

The plaintiff in bringing his action under the above two statutes has made an election not to sue for single damages with interest. The plaintiff could have elected to sue defendant for conversion and, pursuant to *Grays Harbor Co. v. Bay City Lumber*, 47 Wn.2d 879, 289 P.2d 975 (1955), recovered interest as well as damages. The same type of situation was presented in *McCloskey v. Ryder*, 138 Pa. 383, 21 Atl. 148, 150, where the court stated:

“But the Act of 1824 does not give a new action but a statutory measure of damages ‘to be recovered with costs of suit by action of trespass or trover as the case may be.’ This action is trespass *quare clausum*, in which the *plaintiffs have declared for double or treble value of the trees as their measure of damages instead of single value with interest.*” (Emphasis added)

PART VIII**The Trial Court Erred by Failing to Enter Adequate Findings of Fact and Conclusions of Law as Required by Rule 52, F.R.C.P. (Specifications of Error 3.1 and 4.1)**

The trial court, in its oral opinions (R. 337-354) stated his findings and conclusions in a summary manner. He disposed of defendant's affirmative defenses, which have been presented in the preceding seven parts of this brief, with the statement that they were not established by a preponderance of the evidence. (R. 341) In addition, in Finding and Conclusion No. 4 (R. 335), the court considered only one facet of ratification, i.e., ratification by silence.

From the court's oral opinions it is impossible to determine the basis of his decision on each of the affirmative defenses or whether he even ruled on them. He apparently rested his decision upon a lack of proof, but this was clearly erroneous as a number of the defenses were based on undisputed facts, *e.g.*, ratification by filing a creditor's claim, by demanding the proceeds, by suing the Jackson Estate, and by settling the lawsuit and exercising dominion over the proceeds. In addition, the court completely ignored the arguments that Jackson had inherent authority, as managing partner, under the Uniform Partnership Act, to execute the Rayonier-Jackson Contract and that Rayonier, as a purchaser from Nina Bumgarner, could not as a matter of law, have committed trespass or waste. It was for these reasons that appellant filed a motion under Rule 52 for additional findings, which motion particularized the areas where the court had failed to make findings and conclusions in compliance with Rule 52. (R. 288-333)

However, notwithstanding the trial court's failure to

comply with Rule 52, and to grant appellant's motion, it is submitted that there are sufficient undisputed facts in the record to establish any one of Rayonier's affirmative defenses and that the interests of justice require that the Court of Appeals should decide the questions involved, rather than remand the case to the District Court for further proceedings.

CONCLUSION

This is a strange lawsuit.

The plaintiff has not been damaged, as he has received the full value of the joint venture interest in the timber cut, which incidentally is about five times what he paid for the whole (and he still has a residual interest worth nearly four times the purchase price).

The cutting complained of was done in response to good faith efforts by the Western Washington Indian Agency and others to provide funds for an elderly, needy, Indian lady. The cutting was done under the watchful eye of the Indian Service and pursuant to an approved plan for good forestry and sustained yield practices.

The defendant has paid the full value of the timber it cut and has received no special benefit or advantage.

The plaintiff and his employees and attorneys had personal knowledge of the existence of the contracts involved, of Rayonier's plans to log and of Rayonier's actual logging, either in advance of the logging or very soon after commencement of logging. The failure of plaintiff and his attorneys to raise any objection or question about the proceedings can be characterized only in one of two ways:

(a) *They acted like normal people, who knew what was going on and approved and ratified it; or*

(b) *Their actions were so unnatural and contrary to*

normal human conduct that they must be estopped from objecting to the transactions.

A man who has spent his life in the timber business, who goes into business with an Indian chief and allows him *carte blanche* to acquire and deal in Indian timber lands, and who hires a specially knowledgeable Indian Service attorney to assist them, should not be permitted to suddenly declare himself isolated from the consequences of his own machinations and should not be allowed, after-the-fact, to pick and choose among their activities.

This lawsuit is an obvious afterthought on the part of the plaintiff Polson. His managing partner led Rayonier into a contract. Polson accepted the benefits of the contract. He and his attorneys waited for over eighteen months, with full knowledge, until asserting a right to repudiate the contract and to recover penal damages. The court should not lend itself to such an action.

The judgment of the District Court should be reversed, with directions from this court to enter judgment for appellant, Rayonier Incorporated.

Respectfully submitted,

HOLMAN, MARION, PERKINS, COIE & STONE
DOUGLAS P. BEIGHLE
LUCIEN F. MARION

Attorneys for Appellant

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DOUGLAS P. BEIGHLE
LUCIEN F. MARION

Of Counsel for Appellant

APPENDIX A

EXHIBITS INDEX TO TRANSCRIPT

Plaintiff's Exhibits

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
1	4	4	4
2	4	4	4
3	4	4	4
4	4	4	4
5	4	4	4
6	4	4	4
7	4	4	4
8	4	4	4
9	4	4	4
10	4	4	4
11	4	4	4
12	4	4	4
13	4	4	4
14	4	4	4
15	4	4	4
16	4	4	5
17	4	4	5
18	4	4	5
20	4	4	5
21	4	4	5
22	4	4	5
25	310	310	311
27	189	188	188
28	294	295	295
29	294	295	295
30	272	272	272
31	271	272	272
32	272	272	272
33	243	292	309
34	292	292	292
35	297		
50 through 115	108	109	109

A-2

<u>No.</u>	Defendant's Exhibits		<u>Received</u>
	<u>Identified</u>	<u>Offered</u>	
A-1	83	83	83
A-1-A	83	83	83
A-2	83	83	83
A-3	83	83	83
A-4	83	83	83
A-5	479	479	479
A-6	83	83	83
A-7	83	83	83
A-8	83	83	83
A-9	83	83	83
A-10	83	83	83
A-11	83	83	83
A-13	83	83	83
A-14	83	83	83
A-15	83	83	83
A-16	83	83	83
A-17	83	83	83
A-18	83	83	83
A-19-A through			
A-19-N	122	181	181
A-20-A through			
A-20-D	181	181	181
A-21-A through			
A-21-G	481	481	481
A-22-A through			
A-22-P	481	481	481
A-23	182	182	182
A-24-A through			
A-24-F	481	481	481
A-25-A through			
A-25-C	481	481	481
A-26-A through			
A-26-C	481	481	481
A-27-A through			
A-27-C	481	481	481
A-28-A through			
A-28-G	481	481	481
A-29-A through			
A-29-E	481	481	481

A-3

<u>No.</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
A-30	481	481	481
A-31	481	481	481
A-31-A through			
A-31-F	182	183	481
A-32-A through			
A-32-C	481	481	481
A-33-A through			
A-33-I	481	481	481
A-34	183	183	183
A-35	183	183	183
A-36	488	488	488
A-38	488	488	488
A-39-A through			
A-39-D	488	488	488
A-40	487	488	488
A-41	475	488	488
A-42	613	613	614
A-43	613	613	613
A-44	613	613	613
A-45	184	614	614
A-46-A through			
A-46-G	513	615	615
A-47	610	610	610
A-48	610	610	610
A-49	146	146	146
A-50	610	619	620
A-51	610	611	611
A-52	611	612	612
A-53	611	611	611
A-54	184	184	612
A-55	184	184	595
A-56	184	184	595
A-57	184	184	595
A-58	612	612	612
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A-60	170	171	171
A-61	170	171	171
A-62	170	171	171
A-63	185	185	614

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS
OF LAW TO WHICH ERROR IS ASSIGNEDSpecifi-
cation
Number

Finding and Conclusion

1.1

F. & C. No. 4 (R. 335)

"4. Polson was not aware of the existence of the logging contract until the spring of 1961, and he did not have full knowledge of all material facts regarding the contract until July of 1961. Rayonier has not established that Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances, or that Polson's conduct misled or prejudiced Rayonier. Accordingly, Rayonier has failed to establish either its affirmative defense of Ratification or that of Estoppel."

1.2.1

F. & C. No. 5, Ex. B (R. 340-1)

"After full consideration of the evidence and the briefs and the authorities, I am satisfied that a preponderance of the evidence shows that all of the elements essential to establish a right of recovery by plaintiff for treble damages under RCW 64.12.020 and/or in the alternative treble damages for cutting timber on the lands of another person without authority under RCW 64.12.030, have been fully established, and judgment should be for plaintiff unless precluded by one or more of the defendant's affirmative defenses."

1.2.2

F. & C. No. 5, Ex. B (R. 341)

"Each of the several defenses has been carefully considered in the light of the facts I find shown by a preponderance of the evidence I considered credible, and, of course, in view of the controlling authorities, in my opinion, the evidence actually preponderates against the defenses of estoppel, ratification, and apparent authority, but at a minimum

I must find, because I sincerely believe it to be correct, that there is not a preponderance of the evidence to sustain any of the affirmative defenses.”

1.2.3

F. & C. No. 5, Ex. B (R. 342-3)

“There is no direct evidence in the case which I find credible, nor any inference from evidence which I consider reasonable, showing that Beaulieu any time had, was held out as having, or exercised any responsibility, authority, or agency for either Polson individually or for the Polson-Jackson joint venture concerning the sale of either land or timber owned by the joint venture. There is no evidence that he even so much as knew of a single proposed sale of joint venture land or timber other than as to the Bumgarner tract. He so testified, I believe him, and I do not consider any countervailing evidence has been offered.

“In my opinion, it is a fair inference from the evidence as a whole that Beaulieu’s duties and responsibilities for the joint venture were largely, if not wholly, clerical and ministerial, and such as they were, his duties were primarily, if not *exclusively*, concerned with the acquisition of timber lands by the joint venture and not the sale of joint venture property.

“I find as a fact that such limited knowledge of the Bumgarner transaction as Beaulieu had, and in this respect I accept his statement of it and his views of what it amounted to at all times prior to the death of Jackson and for some time thereafter, indicated a tentative or proposed transaction. Beaulieu did not personally participate in that transaction, that is, in the negotiations or anything of that sort. He assumed, and under all of the circumstances I find he had a right to assume, that Jackson would not act in the matter in violation of his limited authority under the joint venture agreement which he, Beaulieu, knew of from the beginning of his employment for the joint venture.”

1.2.4 F. & C. No. 5, Ex. B (R. 343-4)

“ . . . I further find under all the circumstances that it was not his responsibility or duty to report what little he knew of the matter to Polson.”

1.2.5 F. & C. No. 5, Ex. B (R. 344)

“From these views it is my conclusion on the facts as found that the plaintiff is entitled to recover treble damages as prayed for based on RCW 64.12.020 or, in the alternative, RCW 64.02.030, or both.”

1.2.6 F. & C. No. 5, Ex. C (R. 349)

“Therefore, on that phase of the matter, I consider it so clearly indicated that further expense and delay in final disposition of this case by referral of the question to the State Supreme Court is not warranted. Therefore, I will hold and find in computing single damages, interest should be allowed.”

1.2.7 F. & C. No. 5, Ex. C (R. 353)

“Certainly the resolution of the first of these two questions: namely, whether recovery should be allowed for the full amount of the value of the timber stipulated at \$23,000, or for only one-half of that amount, is not entirely free from doubt.

“Any extended dissertation on the several facets of the question would take an extended statement. Viewing the situation as a whole, considering that recovery is for a wrongdoing, which the court has found and is fully satisfied was totally unjustified on the part of Rayonier, the terms of the joint venture agreement and the addenda thereto, and the practices of the parties make it very clear all Jackson was to have out of the joint venture business was a share in whatever profits might result from it. It was also made emphatically clear that Polson was to be fully reimbursed for funds expended by him before any consideration be given to a distribution of profits to Jackson. I am satisfied on the whole

issue that the recovery should be for the full amount of the single damages in the amount stipulated, and that will be the ruling of the court.”

1.2.8

F. & C. No. 5, Ex. D (R. 361)

“Considering the latest memoranda and the entire record, I have no doubt whatever in my mind that recovery can and should be grounded in trespass. However, if on appellate review it should be determined that the action does not lie in trespass, I find that it should and does lie in waste. Therefore, I now hold and find that recovery be allowed for trespass, which, of course, will not include recovery of attorneys’ fees; and if it be found on appellate review that recovery in trespass is not appropriate, it is found and held that recovery be allowed for waste including allowance for attorneys’ fees in the amount previously specified.”

IN THE
United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

FILED BRIEF OF APPELLEE

DEC 2 1966

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IN THE
United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

STATEMENT OF FACTS

The appellant's Statement of Facts is fairly accurate. However, appellant has stated certain questionable conclusions and there are certain additions which should be made. The organization used by the appellant will be followed and those areas where amplification is needed will be pointed out. The words Rayonier and appellant will be used interchangeably throughout.

A. Background

The Polson-Jackson Joint Venture.

The 1951 Joint Venture Agreement (Ex. 1) was recorded on June 3, 1953, in Volume 337 of Deeds at page 444, records of Grays Harbor County, State of Washington. (Tr. 618) The terms of the Joint Venture were amended and restated in an agreement dated November 5, 1957. (Ex. 2) Appellant has referred to Jackson as the manager of the Joint Venture, and to some extent he was. However, as set forth in the 1951 Joint Venture Agreement (Ex. 1) and the Declaration relating to the Bumgarner Allotments (Ex. 3) the consent of Polson was required before any timber cutting contract or sale could be consummated. Further, outside of the contract in question here, Jackson did not enter into any sales of land or timber or timber cutting contracts on behalf of the joint venture. (Tr. 64-65, 494)

The Crane Creek Contract.

As a practical matter, the Crane Creek Contract effectively ties up the Indian interests on the reservation. Unless an Indian owner places his allotment under the Crane Creek Contract and then waits for Rayonier to log it, he has to wait until 1986 when the Crane Creek Contract expires before he can proceed to have his allotment logged by other parties. (Tr. 304)

Frank D. Beaulieu.

Mr. Beaulieu is an elderly man, at the time of the trial he was 83 years old. (Tr. 488) His practice of law, if any,

was very limited. His duties and responsibilities for the joint venture were largely, if not wholly, clerical and ministerial, and such as they were, his duties were primarily, if not exclusively, concerned with the acquisition of timber lands by the joint venture and not the sale of joint venture property. (F & C No. 5, Ex. B, R. 342-343, and see citations to the record set forth in the Appendix hereto in support of said finding)

Cleveland Jackson

Jackson received approximately \$400 a month from Rayonier. The monthly accountings Jackson submitted set forth the number of days worked. However, no check was made as to whether he actually worked and it appears in many instances he did not, in fact, perform any work during a given month. (Tr. 241-245) Jackson, as chief of the Quinault Indian Tribe, was a valuable man to Rayonier. He knew all the Indians and was successful in getting rights-of-way. (Tr. 245-246) Since 1947, and particularly for the past five years, Rayonier has obtained about 30% of the timber needs for their Grays Harbor mill from the Quinault Indian Reservation. (Tr. 248)

Nina Bumgarner

Several of the statements made by appellant are conclusions with which we take exception. The assertions that the contracts were merely to accommodate Mrs. Bumgarner and that Rayonier had no axe to grind and no ulterior motives, are based on testimony of Rayonier's employee witnesses. Based on the record as a whole, there is a strong basis for inferring ulterior motives on the

part of Rayonier. These will be dealt with in the argument portion of this brief.

The price under the Crane Creek Contract was stipulated to by the parties as the value to be used in determining damages. However, appellee had contended the fair market value was higher and appellant had contended it was lower.

B. Acquisition of a One-Half Interest in the Bumgarner Allotments

The appellant's description of the restrictions in August 5, 1953 Declaration (Ex. 3) is inadequate. The Declaration is an acknowledgment by Jackson that he holds title to the undivided interests in the Bumgarner allotments

“ . . . as trustee under the terms of a certain agreement dated March 5, 1951, and is without power to sell, exchange, convey, mortgage or otherwise encumber the same or contract in respect thereto except in accordance with the terms of said agreement, an original counterpart of which has been deposited with Arnold Polson at Hoquiam, Washington, where upon authorization from Cleveland Jackson said agreement may be inspected by persons interested in said property.”

Paragraph IV of the 1951 Joint Venture Agreement (Ex. 1) provides in pertinent part:

“Sales or other dispositions of the tracts so acquired, or any of them, including contracts for the logging of the timber thereon, shall be made from time to time *as agreed upon by the parties hereto*, and all proceeds thereof as received shall be paid to Polson. . . .” (Emphasis supplied)

C. 1954 Memorandum of Intent

The registered letter sent by Polson to Rayonier (Ex. 6) is important and therefore the body of it is set forth below in its entirety.

“I am advised that under date of April 19, 1954, you, through M. B. Houston, Assistant to your President, entered into an agreement with Cleveland Jackson relative to road use rights for access to certain lands in the Crane Creek cutting unit of the Quinalt Indian Reservation. *I call to your attention that as to some, if not all, of the lands to which that agreement relates, Cleveland Jackson holds title as trustee only and is without power or authority to contract in respect thereto except in accordance with the terms of the agreement under which he is acting as trustee*, as is evidenced by various instruments duly recorded in the office of the Auditor of Grays Harbor County. *I further give notice that the purported agreement with you dated April 19, 1954, is unauthorized insofar as it relates to lands covered by said trust agreement.*

“I am one of the beneficiaries of said trust agreement and will be available with Mr. Jackson to negotiate for such facilities as may be necessary and/or desirable for access to and the logging of the lands covered by said trust agreement.” (Emphasis supplied)

The Bumgarner allotments were included in the April 19, 1954 letter agreement to which the above letter refers.

D. Negotiations With Bureau of Indian Affairs Prior to the Rayonier-Jackson Contract

Mr. Libby may have assumed Mr. Jackson had authority to speak for the Joint Venture, but there is no evidence that he was aware of any transactions consummated by Mr. Jackson. One additional fact is important. When

the Indian Agency first undertook to sell Mrs. Bumgarner's interest in the two allotments by public auction, Rayonier protested the sale. The letter of protest (Ex. 56) dated October 31, 1953 referred to the Crane Creek Contract and stated in pertinent part:

"Rayonier Incorporated hereby protests and objects to the proposed sale of the above described tracts within the Crane Creek Logging Unit or the timber thereon unless and until the same is first offered to Rayonier under the above identified contract.

"We regard the proposed sale as a violaton of the above quoted representations, which representations were of importance to us in our decision to enter into our contract."

E. Events Prior to the Rayonier-Jackson Contract

There are several areas here which should be expanded. At the time of the execution of the contracts between Rayonier and the Indian Service (on behalf of Nina Bumgarner), Mr. Libby did not contemplate Rayonier could log the allotments without first obtaining the consent of the owners of the other undivided interest. (Tr. 409-41) He had so advised Rayonier and felt it was their responsibility to obtain the necessary consent. (Tr. 404) Rayonier was aware of the necessity of such consent and did not consider it could log without appropriate consent. (Tr. 209-212)

Rayonier was fully aware that the undivided interest in the Bumgarner allotments was Polson-Jackson joint venture property. (R. 138) Despite the foregoing knowledge, Rayonier drafted the Rayonier-Jackson contract (Ex. 15) in which it was provided that:

“Whereas, Jackson represents and warrants to Rayonier that he is the owner of the remaining one-half interest in the timber on the above described property. . . .”

The Rayonier-Jackson contract also provided that payments were to be made to Jackson, even though Mr. Forrest had previously read the 1951 Joint Venture Agreement wherein it provided all proceeds were to be paid to Polson. (R. 137) Further, there is no reference in the Rayonier-Jackson contract to Polson or to the Polson-Jackson Joint Venture.

With respect to “negotiations” by Jackson during 1959 and 1960 with prospective purchases, Jackson reported he had prospects and he was to determine how interested they were. However, Polson made it clear he was to be present at any negotiations. (Tr. 67-74) They did not have any such negotiations.

F. Investigation By Polson of Joint Venture Properties

It should be noted that for quite a few months following the death of Cleveland Jackson, matters were very confused and uncertain. (Tr. 510) This was a period of checking out false leads, determining true facts, locating assets, etc. (Tr. 508) It is not fully clear just when various facts became fully known. It was the finding of the court that based on all the evidence, Polson did not acquire full knowledge of all material facts until July, 1961. (R. 335)

G. Logging By Rayonier on the Allotments

The logging by Rayonier was substantially completed by July 1, 1961. (R. 140) At the time that Rayonier made

payments to Anna Jackson, as executrix of the Estate of Cleveland Jackson, it had in its possession a copy of the 1951 Joint Venture Agreement which provided that proceeds from any sales or logging were to be paid to Polson. (Ex. 1, Tr. 299) Rayonier did not review the 1951 Joint Venture Agreement at the time it decided to make the payments to Anna Jackson. (Tr. 299)

H. Creditor's Claim and Demands Upon Jackson Estate

Appellant has used the words "standing demand." Mr. Bush in his deposition used the word demand. His testimony at the trial as to the specific facts disclosed that the actions were more in the nature of a request to preserve funds than a "legal demand." (Tr. 580-584) Mr. Kirkwood testified there was no "demand." (Tr. 517) In addition, the Creditor's Claim did not include a claim for the proceeds from the Bumgarner Allotments. (Tr. 582)

I. Suit By Polson Against Jackson Estate

It is the position of appellee that the suit against the Jackson Estate did not include any claim to the proceeds from the Bumgarner Allotments. (Tr. 583 and see Part II of the argument portion of this brief)

J. Settlement

The primary purpose of the escrow was to preserve the funds pending the outcome of this litigation. (Tr. 583) It was felt that if Mrs. Jackson obtained the funds she would dissipate them. (Tr. 581-582) Mr. Bush, attorney for Polson, suggested to Rayonier that they should tie up the funds, but they didn't do so. (Tr. 582)

Subsequent to the trial and the judgment of the trial court allowing Rayonier an offset for the amount of the escrow funds to extent they could be recovered, the funds were delivered to Polson under a stipulation that such delivery would not act to the prejudice of either of the parties to this action.

RESPONSE TO APPELLANT'S SPECIFICATIONS OF ERROR

Specification 1.1 Finding and Conclusion No. 4 (R. 335)

This finding deals with (1) when Polson became aware of the existence of the logging contract; (2) when he acquired full knowledge of material facts; (3) that it has not been established that either (a) Polson's failure to notify Rayonier was unreasonable in the circumstances or (b) that Polson's conduct actually misled or prejudiced Rayonier. The conclusion reached is that Rayonier failed to establish either its affirmative defense of ratification or estoppel.

It should be kept in mind that the burden of proof of the affirmative defenses rested on the appellant and the court found this burden was not sustained. In an appendix to this brief we have set forth citations to the record in support of the above finding. However, to large extent the determination rests on a failure on the part of appellant to sustain its burden of proof.

In its brief, on page 28, appellant has primarily referred to items of alleged prejudice to appellant. The rebuttal argument to appellant's statements is set forth in Part III of the argument portion of this brief under the heading "The silence must have actually misled and prejudiced appellant" (page 42 hereof). In fact the appel-

lant was not prejudiced by any lack of action by Polson after he acquired full knowledge of the material facts. Further, as set forth therein, a proper inference from the evidence is that the appellant did not, in fact, rely upon a lack of objection by Polson and was not misled. Rather, its actions were unlawful and unwarranted.

**Specification 1.2.1 Finding and Conclusion No. 5
Ex. B (R. 340-1)**

This deals with the court's conclusion that a preponderance of the evidence established the right of the plaintiff to recover treble damages unless precluded by one of the defendant's affirmative defenses.

Appellant on page 2 of its brief has stated that the finding is erroneous because (1) it ignores Jackson's "inherent authority" and (2) Rayonier, as a purchaser from Nina Bumgarner, could not be guilty of either statutory trespass or waste. The inherent authority question is covered in Part I of the argument portion of this brief and the status of Rayonier as a purchaser from Nina Bumgarner in Part IV. Particular citations to the record with respect to these two areas are set forth in the appendix hereto.

**Specification 1.2.2 Finding and Conclusion No. 5. Ex.
B (R. 341)**

This finding sets forth the trial court's conclusion that the evidence actually preponderates against the defenses of estoppel, ratification, and apparent authority, but at a minimum it has to be found that there is not a preponderance of the evidence to sustain any of the affirmative defenses.

Appellant, on page 29, states this finding is erroneous because it (1) ignores Jackson's inherent authority; and (2) ignores the fact that as a matter of law Polson has either ratified the Jackson-Rayonier contract or is estopped to question its validity. The inherent authority question is considered in Part I of the argument portion of this brief; the ratification question in Part II; and the estoppel question in Part III. The finding and conclusion is correct. Some citation to the record supporting this finding has been set forth in the appendix hereto. However, to a large extent, this is a negative situation because it involves the failure of the appellant to sustain its burden of proof on affirmative defenses.

Specification 1.2.3. Finding and Conclusion No. 5. Ex. B (R. 342-3)

The finding deals with the duties and actions of Frank Beaulieu in connection with Joint Venture affairs. The finding is well supported by the evidence. Citations to the record are set forth in the appendix hereto. Appellant has primarily taken exception to the characterization of Beaulieu's duties as clerical and ministerial and to the statement that his duties were in connection with the acquisition of timberlands for the Joint Venture and not the sale of Joint Venture property. The finding is correct and is supported by the evidence. Beaulieu did not make decisions. He checked records, prepared documents, checked files and maintained files. (Tr. 343-345) All this was in connection with acquisitions. Beaulieu testified he did not know of any sales of Joint Venture property. (Tr. 493-494) In fact, there were none.

**Specification 1.2.4 Finding and Conclusion No. 5.
Ex. B (R. 343-4)**

This finding states that under all the circumstances it was not Beaulieu's duty to report what little he knew of the matter to Polson.

Beaulieu was an employee. He naturally assumed Jackson would discuss the matter with Polson, since he knew both of them had to agree to any timber cutting contract. Jackson had all the facts. Therefore, Beaulieu properly felt it was not his responsibility to do anything further.

**Specification 1.2.5. Finding and Conclusion No. 5.
Ex. B (R. 344)**

Here the court states its conclusion that the plaintiff is entitled to treble damages. This being a legal conclusion, there is no need for citations to the record. The facts applicable to the various legal questions are set forth in the argument portion of the brief.

**Specification 1.2.6. Finding and Conclusion No. 5. Ex.
C (R. 349)**

The court allowed interest on the compensatory portion of the damages. This is strictly a legal question and is covered in Part VII of the argument portion of this brief.

**Specification 1.2.7. Finding and Conclusion No. 5. Ex.
C (R. 356)**

The court ruled the recovery should be for the full amount and not reduced by reason of any interest of Jackson. The court held that the agreement clearly established Polson was to be fully reimbursed before Jackson was to have participated in any proceeds.

The argument on this is set in Part VI of this brief.

Citations to the record in support of the finding are set forth in the appendix. In light of the substantial embezzlement by Jackson, there will never be any proceeds in which Jackson will be entitled to participate. (Tr. 516-517) Polson will, in all probability, never be fully reimbursed. Appellant has continued to approach the matter on a parcel by parcel basis, which is clearly contrary to the provisions of the Joint Venture Agreement.

**Specification 1.2.8. Finding and Conclusion No. 5.
Ex. D (R. 361)**

This is a legal conclusion that appellant was liable for treble damage trespass under R.C.W. 64.12.030 and in the alternative for treble damage waste under R.C.W. 64.12.020. The legal conclusion is correct. The argument on behalf of appellee is set forth in Part IV of the argument portion of this brief.

Specification 1.3. Finding and Conclusion No. 2. (R. 334-335)

Appellant has taken exception to this portion of finding which states that Mr. Libby (Indian Service) “did not have authority to authorize a contract without first obtaining the approval of Polson, which approval was not obtained.” Citations to the portions of the record supporting this finding are set forth in the appendix. The argument with respect thereto is set forth in Part IV of the argument portion of this brief under the heading “The Bumgarner-Rayonier Contracts, or the Performance Thereof, Were Necessarily Conditional Upon Appellant Obtaining Polson’s Consent.” (Page 53)

In addition, the appellant, in Specifications of Error 2.1 through 5.1, has cited as error the refusal of the

court to make certain findings and conclusions favoring appellant. There are no citations to the record by the appellant. These are matters of argument covered in the briefs.

SUMMARY OF ARGUMENT

The facts clearly established Jackson did not have any authority, whether actual, apparent or inherent, to execute the Addendums or the Rayonier-Jackson Contract for the cutting of timber on the Bumgarner Allotments. The execution of the contract and the cutting and removal of timber was without Polson's knowledge or consent. Rayonier had more than adequate warning as to restrictions on Jackson's authority. Yet, Rayonier proceeded to deal with Jackson and to cut the timber after Jackson's death without once communicating with Polson. Such action was reckless and totally unjustifiable.

The Rayonier-Bumgarner contracts did not give Rayonier the right to proceed without first obtaining the requisite consent of the other co-owner of the allotments. This consent was not obtained. Rayonier cut and removed over 3 million board feet "without lawful authority" and by doing so subjected itself to the treble damage provisions of R.C.W. 64.12.030, or, in the alternative, R.C.W. 64.12.020.

Appellant Rayonier raised several affirmative defenses, principally apparent authority, ratification and estoppel. However, as to each the Court properly found appellant had failed to sustain its burden of proof. In fact, the Court felt the evidence preponderated against the affirmative defenses. The apparent authority issue was mentioned above. With respect to ratification, it was

clearly established Polson at no time intended to ratify the contract and in light of the existing circumstances his actions were reasonable and would not give rise to a forced ratification. As to estoppel, several important factors were established. Under the circumstances, Rayonier cannot be considered an innocent party in proceeding as it did despite the facts which would have acted as a warning to any reasonably prudent party. Polson's actions were reasonable in light of the existing circumstances, and would not give rise to estoppel. Further, Rayonier did not, in fact, rely upon any lack of objection from Polson, or if it did so, such reliance was clearly unjustified. Finally, Rayonier, after July, 1961, the point in time when Polson finally acquired reasonably full knowledge of the material facts, was not prejudiced by any action or lack of action on the part of Polson. Substantially all of the logging was completed by July 1, 1961. The subsequent payment by Rayonier to Anna Jackson was contrary to the 1951 Joint Venture Agreement, of which Rayonier had a copy, and such action by Rayonier was unwarranted and disregarded the rights of Polson. Throughout, Rayonier studiously avoided contacting Polson despite his clear rights therein. In any event, the funds paid to Anna Jackson were preserved through the efforts of Polson's attorney and Rayonier was allowed an offset.

The trial court after carefully reviewing the evidence and legal arguments correctly determined the appellant to be liable for treble damages under R.C.W. 64.12.030, or, in the alternative, under R.C.W. 64.12.020.

PART I**Jackson Did Not Have Apparent Or Inherent Authority to Execute the Rayonier-Jackson Contract and the Addendums**

Part I of the Argument portion of appellant's brief is devoted to the issue of Inherent Authority, which is much the same as the better-known doctrine of apparent authority. The evidence clearly established no apparent or inherent authority in fact existed.

The principal can always limit the authority of his agent (or partner) and if the limitation is known to the third party, the power to bind the principal is so limited. Further, a person dealing with an agent must use reasonable diligence and prudence to ascertain whether the agent (or partner) is acting within the scope of his authority. If the third person knows, or should know, of the limitations placed on the agent's authority and that the agent is exceeding it, the principal cannot be bound. A good summary of the duty of a third person to ascertain the extent of an agent's authority is set forth in 3 Am. Jur. 2nd, *Agency*, Section 78, on pages 482-483, as follows:

"A third person dealing with a known agent may not act negligently with regard to the extent of the agent's authority or blindly trust the agent's statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers. The mere opinion of an agent as to the extent of his powers, or his mere assumption of authority without foundation, will not bind the principal; and a third person dealing with a known agent must bear the burden of determining for himself, by exercise of reasonable diligence and prudence, the existence or nonexistence of the agent's authority, to act in the premises. The principal, on

the other hand, may act on the presumption that third persons dealing with his agent will not be negligent in failing to ascertain the extent of his authority as well as the existence of his agency.”

See also:

Pacific Savings & Loan Assn v. Corbett, 155 Wash. 45, 283 Pac. 479 (1929).

Brace v. Northern Pac. Ry. Co., 63 Wash. 417, 115 Pac. 841 (1911).

O’Daniel v. Streeby, 77 Wash. 414, 137 Pac. 1025 (1914).

Woodworth v. School Dist. No. 2, Stevens County, 92 Wash. 456, 159 Pac. 727 (1916).

Olsson v. Hansen, 50 Wn.2d 199, 310 P.2d 251 (1957).

As stated in *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 627, 374 P.2d 677 at page 680 (1962):

“The burden of establishing agency rests upon the one who asserts it. Facts and circumstances are sufficient to establish apparent authority only when a person *exercising ordinary prudence*, acting in good faith and conversant with business practices and customs, would be misled thereby, *and such person has given due regard to such other circumstances as would cause a person of ordinary prudence to make further inquiry.*” (Emphasis supplied)

Rayonier had knowledge of, or certainly should have known of, the limitations on Jackson’s authority. Rayonier, as shown below, had sufficient knowledge to give rise to a duty to inquire as to the exact nature of Jackson’s authority.

1. The 1951 Joint Venture Agreement provided that

sales could be made as agreed upon by both Jackson and Polson, and the proceeds were to be paid to Polson. (Ex. 1) The agreement or consent of both parties was essential.

2. Rayonier obtained a certified copy of the 1951 Joint Venture Agreement in June of 1954 (R. 136), and Forrest read said agreement prior to July 2, 1959, when the Addendums were signed by Jackson. (R. 137) Further, said agreement had been recorded. (R. 133)

3. The Declaration (Ex. 3) recited that Jackson was holding title as trustee only and was without authority to sell, convey, or otherwise contract with respect thereto, except in accordance with the terms of the 1951 Joint Venture Agreement. The Declaration was recorded in May of 1954. (Tr. 618)

4. In April of 1954, Rayonier and Jackson entered into a letter agreement (Ex. 5) with respect to rights of way over certain lands, including the Bumgarner lands. (R. 136)

5. Polson advised Rayonier by registered letter in June of 1954 that Jackson held title as trustee only, he did not have authority to execute the agreement (Ex. 5), and said agreement was unauthorized. See page 5 hereof for the full wording of the letter.

6. Rayonier knew Jackson's ownership in the Bumgarner Allotments was subject to the terms and conditions of the agreement between Jackson and Polson. (R. 138)

Clearly, the above items were enough to place Rayonier on notice that there were limitations on the extent of Jackson's authority. It became incumbent on Rayonier to in-

quire as to the extent of his actual authority in a given situation. When Rayonier failed to do so, it acted at its peril. A single telephone call to Polson would have avoided this entire lawsuit, and Forrest knew full well where to contact Polson. (R. 136) This is particularly true where a sale of a joint venture asset was involved. The tendency of the courts has been to not extend authority by implication to include such an extraordinary and unusual power. See 3 Am. Jur. 2nd *Agency*, Section 117, page 514.

The appellant has tried to minimize the effect or importance of Item 5 above; the letter from Polson to Rayonier on June 1, 1954 advising Rayonier that Jackson held title as trustee only, that he did not have authority to execute any such contracts, and said agreement was unauthorized. However, despite the arguments of appellant, this letter would have acted as a strong warning to any reasonable party. The questioning of Mr. Forrest in connection with the interpretation properly to be placed on the June 1, 1954 letter is pertinent:

“THE COURT: Now, I also understand that it was you who was in charge of the negotiations or the inquiries leading into the letter, Exhibit 5—

“THE WITNESS: Yes.

“THE COURT: Operating, of course, as a subordinate to Mr. Houston, is that right?

“THE WITNESS: That is right.

“THE COURT: You were thoroughly familiar with the proposed right-of-way and the problems incident to that that are referred to in this Exhibit 5, the proposed letter agreement?

“THE WITNESS: Yes.

“THE COURT: Now, in connection with that, this

letter of Mr. Polson's, Exhibit 6, that came to your attention at that time?

"THE WITNESS: No, your Honor, I never saw this letter until my deposition was taken. This went to the Seattle office. My office is in Hoquiam.

"THE COURT: Your attention was called to the fact that Polson had made an objection?

"THE WITNESS: Yes.

"THE COURT: You did know that Polson had objected to the transaction referred to in Exhibit 5?

"THE WITNESS: That is right.

"THE COURT: Now, the transaction in Exhibit 5 related merely to a right-of-way across a corner of allotment property?

"THE WITNESS: Yes.

"THE COURT: Knowing that Polson had taken objection by written document to Jackson negotiating merely a right-of-way, did this not bring to your mind the fact that Polson might very well have some kind of objection to contracts relating to the cutting of timber?

"THE WITNESS: No, under the circumstances, it didn't.

"THE COURT: What do you mean, under the circumstances?

"THE WITNESS: This objection to this letter, your Honor, was because it was a blanket situation.

"THE COURT: Read what Polson says it was, he doesn't talk about any blanket business, he talks specifically about his letter of Jackson being a trustee only without authority to negotiate or contract for the sale or cutting or whatever doesn't he? Could it be any plainer, that letter, to you, now that you do read it?

"THE WITNESS: No, it is plain.

"THE COURT: I mean it is specific and categori-

cal, isn't it, that Polson states in his letter that 'Jackson holds title as trustee only and is without power or authority to contract in respect thereto excepting in accordance with the terms of the agreement, as evidenced—', and so forth, by the document filed?

"THE WITNESS: Yes.

"THE COURT: Right?

"THE WITNESS: Yes, it says that.

"THE COURT: Now, with the knowledge that the right-of-way transaction was abandoned because of Polson's objections, how do you explain that she [sic—you] never at any time took any occasion to call Mr. Polson's attention to the proposed contract, Exhibit 15, for the cutting of timber on the Bumgarner allotments?

"THE WITNESS: I assumed that Mr. Jackson was a manager of the joint venture and that he had the right to negotiate.

"THE COURT: Well, of course, if you read Exhibit 6, you would know that was—Polson was contending otherwise, wouldn't you?

"THE WITNESS: Exhibit 6.

"THE COURT: Read it now."

. . . .

"THE WITNESS: I have read it.

"THE COURT: Now, having read it, is there the slightest doubt in your mind that Polson was contending that Jackson was without authority to enter into a cutting contract, such as Exhibit 15?

"THE WITNESS: I would still think, your Honor, that Mr. Jackson had the right of management of the trust property.

"THE COURT: That isn't what I asked you; I asked you, is there the slightest doubt in your mind that Polson was contending that Jackson was without authority to enter into a contract such as Exhibit 15?

"THE WITNESS: On the face of it, I would say that is a correct statement.

"THE COURT: There isn't any other interpretation possible of it, is there?

"THE WITNESS: Not under those—not under that light.

"THE COURT: And you say you never saw this letter?

"THE WITNESS: No, I didn't see that letter.

"THE COURT: But somebody in Rayonier saw it.

"THE WITNESS: Yes.

"THE COURT: It must have been Mr. Houston or someone in his department? Is that right?

"THE WITNESS: That is right, it was.

"THE COURT: And that person, whoever it was, should have taken the same inference from this letter that you now take, shouldn't he?

"THE WITNESS: Perhaps so."

(Tr. 304-309)

Mr. Houston did communicate with Mr. Forrest concerning the objection by Polson:

"A. Shortly after that, Mr. Houston called me and told me that he had received a letter from Mr. Polson that was a sharp letter, and to forget this whole thing." (Tr. 601, ll. 7-9)

The balance of appellant's arguments can be covered briefly. Primarily the arguments state conclusions and overlook many basic facts established by the testimony.

1. Appellant's argument: "The business of the Joint Venture included the logging or contracting for the logging of timber."

Indeed, this was one of the stated purposes of the 1951 Joint Venture Agreement. (Ex. 1) However, this agree-

ment, which had been read by L. J. Forrest, also provided that any such action would be by joint consent of both Polson and Jackson. Certainly, then a prudent businessman would require both their signatures to a timber cutting contract. Not so with Rayonier; they drafted a contract (Ex. 15) in which Jackson warranted title and in which there was no mention of Polson or the Polson-Jackson Joint Venture. The facts also established that the only logging contracts in which the Joint Venture was involved were situations where the Joint Venture acquired property *subject to* a timber cutting contract. There were no instances of timber cutting contracts entered into after the acquisition of the property. (Tr. 64-65, 493-494)

2. Appellant's statement: "Jackson was the manager of the partnership and its affairs were handled entirely by him."

To some degree, Jackson did manage the affairs of the partnership. However, this cannot give appellant any real solace. Jackson was active in *acquiring* property not in selling. There were no sales. Polson did allow Jackson to investigate prospective purchasers to determine their degree of interest, but he was not to talk prices, etc. (Tr. 74-75) These were for a possible large sale, not a sale of the timber on only one or two allotments. Further, it was with the clear understanding that Polson was to be present at any negotiations. No such negotiation materialized. (Tr. 74)

3. Appellant's statement: "Jackson was carrying on the partnership business in the usual way."

This statement is completely untenable. As stated previously, there were no other sales or timber cutting con-

tracts entered into by the Joint Venture. (Tr. 493-494) The Jackson-Rayonier contract was unique. Such a timber cutting contract was not usual to the operation of this Joint Venture as it, in fact, operated. Further, when one considers the warning Polson had previously given Rayonier concerning the limitation of Jackson's authority (Ex. 5) and the knowledge Rayonier had as to the existence of the Joint Venture and its ownership of the undivided interest (R. 136-138), it is highly *unusual* that Rayonier would draft a contract (Ex. 15) wherein there was no mention of Polson or the Polson-Jackson Joint Venture, wherein Jackson and his wife were the signators and Jackson warranted title. If this contract was considered by Rayonier to be a natural or usual item of business for the Joint Venture, why was there no mention of Polson or of the Polson-Jackson Joint Venture? Why did they have Jackson falsely warrant title?

4. Appellant's statement: "Rayonier and the Bureau of Indian Affairs had no knowledge of restriction, if any, on Jackson's authority."

This statement is also completely untenable. Rayonier's chief officer in this area had read the 1951 Joint Venture Agreement. (R. 137) The Declaration (Ex. 3) wherein Jackson acknowledged that he was holding title as trustee and was without power to sell etc., except in accordance with the terms of the agreement had been recorded. (R. 135) In 1954, Rayonier entered into a right-of-way agreement with Jackson (Ex. 5), and Polson advised Rayonier by registered letter (Ex. 6) that Jackson did not have the authority to do so, and stated limitations on Jackson's authority. Clearly, Rayonier had knowledge of the existence of restrictions on Jackson's authority. At the

very least, Rayonier had sufficient knowledge to give rise to a duty to inquire. The duty, to determine the extent of Jackson's authority, fell on Rayonier, not the Indian Service, since the responsibility for obtaining the proper consent to the cutting was Rayonier's.

5. Appellant's statement: "The Joint Venture is bound by Jackson's representations concerning Polson's knowledge and approval."

The appellant cannot create authority merely out of the representations of Jackson. There must be independent evidence.¹ There were no other sales or timber cutting contracts on which Rayonier could rely as establishing a course of conduct. In light of the previous warning to Rayonier concerning the limitations on Jackson's authority, Rayonier could not reasonably rely on any statements by Jackson to the contrary. This is the basis on which Forrest stated he decided not to contact Polson. (Tr. 280, 285). Such a decision was clearly unwarranted. There was no evidence to indicate Polson had any knowledge of any such representations by Jackson. Actually, it is clear he was unaware of them. Further, it should be noted Jackson was working for Rayonier. (Tr. 238-248) Rayonier has not denied the regular monthly payments to Jackson, but rather has insisted Jackson was an independent contractor as distinguished from an employee.

Under all the circumstances Rayonier could not justifiably rely on any statements by Jackson as to authority, but rather had a duty to inquire as to the actual extent of his authority. Rayonier had a duty to contact Polson.

1. See *Lamb v. General Associates, Inc.*, 60 Wn.2d 623, 374 P.2d 677, 680, wherein the court stated:

"It is also the well-established rule that the apparent or ostensible authority of an agent can be inferred only from acts and conduct of the principal. (Citations) The extent of an agent's authority cannot be established by his own acts and declarations."

6. Appellant's statement: "The execution of the Rayonier-Jackson contract and the Addendums was within the authority conferred on Jackson as managing partner."

Clearly, it was not. The 1951 Joint Venture Agreement specially provided that any such action would be by agreement of both Polson and Jackson. There was no course of conduct to the contrary. The Rayonier-Jackson contract was the first timber cutting contract. On pages 43 and 44 appellant has cited Sections 50 and 73 of the *Restatement of Agency*, 2d. Both sections start with the words "Unless otherwise agreed." The 1951 Joint Venture Agreement did provide to the contrary and Rayonier was well aware of its terms.

PART II

Polson Did Not in Any Manner Ratify the Rayonier-Jackson Contract and the Addendums

A. Purported ratification by silence.

Appellant has contended Polson remained silent and by such silence must be deemed to have ratified the Rayonier-Jackson contract.

Basically, the rule that ratification *can* be inferred from silence is designed to protect innocent parties. In light of its conduct, appellant Rayonier cannot be regarded as an innocent party. Mr. Forrest and Mr. Vincent testified that despite the following facts, they proceeded to deal with Jackson without once contacting Mr. Polson:

1. Mr. Forrest had read the 1951 Joint Venture Agreement (Ex. 1) and Rayonier had a copy of it in its files. (Tr. 228, 299) This agreement provided that sales could

be made as agreed upon by both Jackson and Polson, and the proceeds were to be paid to Polson.

2. The Declaration (Ex. 3) recited Jackson was holding as trustee only and was without authority to sell, convey or otherwise contract with respect thereto, except in accordance with the terms of the 1951 Joint Venture Agreement. The Declaration was recorded for public record on May 5, 1954 in the Grays Harbor County Auditor's Office. (R. 135)

3. In April of 1954, Rayonier and Jackson entered into a letter agreement with respect to rights of way over certain lands, including the Bumgarner Allotments. (Ex. 5) The information was furnished by Jackson and the agreement was prepared by Forrest. (Tr. 266)

4. By a registered letter dated June 1, 1954 (Ex. 6), Polson specifically advised appellant Rayonier that (a) Jackson held title as trustee only, (b) Jackson was without authority to individually sell, exchange, contract or otherwise dispose of the property, and (c) the above right-of-way agreement was unauthorized. This was a strong warning to appellant which should have raised red flags as to any dealings with Jackson without contacting Polson. Mr. Forrest was aware of the problems which arose and it was at this time that Rayonier obtained a certified copy of the 1951 Joint Venture Agreement. (Tr. 305)

5. Appellant Rayonier (Forrest and Vincent) knew Jackson's ownership in the Bumgarner Allotments was subject to the terms of the 1951 Joint Venture Agreement. (R. 137-138) In fact, they discussed this point at the time the Rayonier-Jackson contract was prepared. (Tr. 218-221)

6. In 1956 appellant prepared a large map showing all the Polson holdings in the Grays Harbor area and it showed the interest in the Bumgarner Allotments as a Polson-Jackson Joint Venture holding. (Ex. 27)

Appellant Rayonier, and in particular Mr. Forrest, who dealt with Jackson, knew full well of Polson's interest in the subject property and the limitations on Jackson's authority. Yet despite all the above, appellant did proceed to deal with Jackson and did not communicate with Polson at any time. Appellant even went further. Appellant drafted the Rayonier-Jackson agreement, in which Jackson warranted full title when appellant knew this was not true, and which provided for payments to Jackson when appellant had read the 1951 Joint Venture Agreement which provided that all payments were to go to Polson. It is difficult to imagine how appellant could have done so in "good faith," and certainly appellant does not fit in the category of an "innocent party." Perhaps the answer can be found in the fact appellant kept Jackson on its "payroll" because he was an extremely valuable man to them by reason of his relationship to the other Indians as Chief of the Quinault Indian Tribe.

It is important to remember silence does not automatically mean there is a ratification. Section 94 of the *Restatement of Agency* 2d, states:

"An affirmance of an unauthorized transaction *can* be inferred from a failure to repudiate it." (Emphasis supplied)

The Restatement does not say ratification *must* be inferred. This distinction is pointed up on page 68 of

Seavey, *Law of Agency* (1 Vol. Edition) (1964) as follows:

“The failure to disaffirm is of course explainable and with conflicting evidence the issue is for the jury, but if the inference is clear, the court can properly find *or not find*, ratification.” (Emphasis supplied)

The trial court herein was the trier of fact and after carefully reviewing all the evidence, it determined Polson acted reasonably and ratification should not be inferred. To some extent this was a negative finding by the court in that it held appellant had not established by a preponderance of the evidence that Polson acted unreasonably under the existing circumstances.

The commentary in Seavey, *Law of Agency* continues on page 68 as follows:

“The period during which the inaction lasted, the difficulty of communicating dissent, the loss which might result from failure to act promptly, as well as the habit and station in life of the purported principal are all relevant, *since ratification depends upon consent in fact* and not upon whether a reasonable person would give consent. *It should be noted also that as to a disobedient agent, who is conscious that he is acting contrary to the principal's desires, there is no moral duty to affirm, as there may be with a faithful but overzealous agent, and affirmance should be found only by conduct clearly indicating it.*” (Emphasis supplied)

There can hardly be any question as to the role of Jackson as a disobedient agent. His actions were clearly contrary to both the 1951 and 1957 Joint Venture Agreements and he embezzled in excess of \$200,000 from Polson. (Tr. 525) Here Jackson was executing a contract, drafted by appellant, in which he falsely warranted

full title, and both Jackson and appellants knew this was false. (Tr. 218-219) It is clear Jackson intended, by executing the contract, to receive the proceeds personally, contrary to the joint venture agreement (Ex. 1) which provided that all proceeds were to be paid to Polson. Further the appellant participated in or at least furthered this deception. The appellant drafted the contract which provided for payment to Jackson, even though Mr. Forrest had knowledge of the Joint Venture Agreement, and its terms. A copy of the Joint Venture Agreement was in appellant's possession at the time the Rayonier-Jackson contract was prepared. (R. 136, Tr. 299) But Rayonier did not even bother to refer to it. (Tr. 219-220)

Although the case of *Myers v. Cook*, 87 W. Va. 265, 104 S.E. 593 (1920), is perhaps in the minority insofar as it uses the term "duty to speak" it is still a well reasoned case and the opinion is applicable here on the question of whether ratification should be inferred in light of the duty on the part of Rayonier to inquire before it acted. In *Mechem Outlines Agency*, Fourth Edition, page 145, the case is well summarized as follows:

"One of the best known and best reasoned cases so holding is *Myers v. Cook*. There it appeared that husband and wife lived apart. He bought logging equipment and gave a promissory note for the price, signing her name as surety. This was done without her knowledge or authority. The husband had never done it before or acted as her agent in any way. When she heard the facts, she "grumbled" to some extent but gave no notice to the payee of the note. The court set aside a judgment against the wife, saying: 'The husband acted for himself in the transaction, not the wife. He acted against her in signing her name to a note for his debt. The plaintiff was as well aware of that fact as he was. *The former acted*

at his peril in taking the note without knowledge as to whether the husband had authority to bind his wife. He was bound to inquire and could not rely upon the supposed agent's representations. Rosendorf v. Poling, 48 W. Va. 621; Rhorbough v. Express Co., 50 W. Va. 155. The plaintiff omitted this duty, and, presumptively, wronged the wife by his acceptance of the note with her name on it. He could have ascertained by inquiry whether her signature was authorized, in time to save himself all she could have saved him by his disavowal. In other words, he could have done for himself what he thinks she should have done for him. To permit him to make her mere failure to do that prove ratification would allow him the benefit of his own wrong' . . ." (Emphasis supplied)

In any event, the foregoing, together with other facts established by the evidence, fully support the determination of the trial court, as the trier of fact, that ratification should not be inferred in this instance.

The appellant has cited several Washington cases as supporting the general rule concerning ratification by silence, but, as shown below, a look at the facts shows each case is clearly distinguishable from this one.

Ankeny v. Young Bros., 52 Wash. 235, 700 Pac. 736 (1909).

This case turned on *conduct* on the part of the principal which evidenced ratification.

Lemcke v. Funk & Company, 78 Wash. 460, 139 Pac. 234 (1914).

This case involved a situation where the principal received benefits from the transaction.

Northwestern Lumber Company v. Cornell, 99 Wash. 250, 169 Pac. 590 (1917).

The third party advised the principal of its understanding of the agreement, and instead of repudiating it, the principal corresponded with the third party and stated he was using every effort to have a certain company take care of it.

Baker v. Seattle & Puget Sound Packing Co., 95 Wash. 45, 163 Pac. 17 (1917).

Basically, the same situation existed as in the *Northwestern* case above. The third party specifically contacted the principal who then remained silent for a long period of time instead of repudiating the agreement. In this case, appellant Rayonier studiously avoided any contact with Polson, when under the facts they certainly should have contacted him. If Rayonier had contacted Polson, and at that point he did not voice any dissent or objection, a far different situation would have existed.

Waldron v. Beattie Mfg. Co., 113 Wash. 533, 194 Pac. 557 (1920):

In this case the principal knowingly held the agent out as having authority and then upon receipt of the order, instead of rejecting it, gave as an excuse for not shipping it that he did not have the goods in stock at the time. This was clearly conduct inconsistent with the non-existence of affirmance.

Tobias v. Towle, 179 Wash. 101, 35 P.2d 1114, 41 P.2d 1119 (1934).

Here the principal knowingly placed the agent in a position of apparent authority and then over a long period of time accepted the benefits of the lease. Neither factor exists in this lawsuit.

B. Purported Ratification by Conduct

Appellant has also contended that Polson, by certain conduct, ratified the Rayonier-Jackson contract. An examination of the facts makes it clear Polson never intended to ratify the conduct and certainly should not be deemed to have done so.

1. Appellant contends Polson ratified by filing his creditor's claim in the Jackson Estate. The fundamental point here is this involves an affirmative defense, and appellant did not sustain its burden of proof. Mr. Bush, the attorney for appellee Polson and the "author" of the Creditor's Claim, stated that the proceeds from the Bumgarner Allotments were not included in the creditor's claim. (Tr. 582-583) Appellant did not pursue this statement any further and it remains as the only clear answer in the record.

Appellant has cited certain testimony by Mr. Polson as establishing that the proceeds were involved. However, appellant failed to quote or cite the following answers by Mr. Polson when appellant's attorney tried repeating the question as to whether the proceeds were included in the creditor's claim:

"I have no way of knowing because I didn't know what the legal status of those things were, of the payments. I was relying on the attorney for, an attorney for advice." (Tr. 127, ll. 20-23)

"I can't answer it yes or no." (Tr. 129, l. 3)

Therefore, there is no necessity to consider the legal question of whether the creditor's claim would constitute a ratification. The appellant did not sustain its burden of proof. The court accepted the statement of Mr.

Bush. Indeed, there was no evidence to the contrary.

2. Appellant contends that the "continuing demand" on the Jackson Estate for payment of the proceeds constituted a ratification of the Rayonier-Jackson contract. In this connection, appellant set forth in its brief certain portions of Mr. Bush's testimony in a deposition as supporting the argument that there was a demand. It is true the word "demand" was used therein. However, the appellant has omitted the testimony of Mr. Bush when the court delved deeply into the matter of "demand" to determine the actual "facts":

"THE COURT: As I understand it, to clarify it, the only request or demand that you have referred to thus far as having been made, was oral and expressed in discussions with Mr. Kirkwood as attorney for the Jackson Estate or attorney for the executrix, Anna Jackson, of that estate, and this was in some of your discussions in the period you have indicated either by telephone or at his office? Is that substantially what you said thus far?

"THE WITNESS: Yes, your Honor. I would say only one—I would only add one thing: I did use the characterization in my deposition 'demand' of what happened.

"I don't think really what happened was a 'demand', I think what we are interested in is what was done.

"THE COURT: The point is, to avoid that very problem, I noticed that very thing, but to avoid that problem, you may have noticed that I referred to either 'request' or 'demand' or what you said.

"Let us put it this way: What did you say to Kirkwood concerning this, and was there any basis for your statement to Kirkwood expressed to him or anyone else?

"THE WITNESS: There were a number of conver-

sations with Mr. Kirkwood.

"He, I think, indicated to me in all of those conversations that he didn't feel that this money belonged to the estate of Cleveland Jackson. He couldn't understand why what was done was done, but he didn't believe it belonged to the estate of Cleveland Jackson. However, there were other parties than Mr. Kirkwood involved in this than Mrs. Jackson.

"There was the National Bank of Commerce, which was the Guardian for three minor children, and there was also another party who was represented by an independent attorney, and those parties did not see eye to eye with Mr. Kirkwood as far as all and everything was concerned.

"I did want to know that Mrs. Jackson was not going to squander that money. Mr. Kirkwood told me somewhere along the way that he would put the money in a separate account, and he would hold the bank account, and I am sure that that was done.

"Sometime later in this picture, Mrs. Jackson became—she wanted money, and she did indicate to me that as far as she was concerned, that was her money, and she was going to take it, and I became very much concerned at that point.

"This, however, occurred after this lawsuit was commenced, and I informed Mr. Marion of this, and told him I thought Rayonier ought to do something to control that money because it was apt to be gone when we got to the time of a resolution of this lawsuit, and Mr. Marion, of course, said, 'well, that is your problem; why don't you get it.' And I said 'I am not going to do it.'

" . . .

"(Continuing) We, of course, knew what this problem was, and we did everything we could to, number one, conserve these moneys, because we knew that if we prevailed in this lawsuit, Rayonier was going to want to recover those moneys. But we

weren't going to say they should be paid to Rayonier because we didn't have any right to control them, we felt, other than to conserve them, and that is what we did.

"Now, those moneys, as in evidence in this case, are tied up.

"THE COURT: The point is, did you at any time express any view other than you now have stated, to Kirkwood in your various discussion with him concerning these funds?

"THE WITNESS: No, my only statement was, 'We want these things' "——" 'We don't want them dissipated, we want them tied up some way so after this lawsuit is disposed of, those funds can be disposed of.'

"THE COURT: Did you ever at any time say to Kirkwood in substance or effect that you were demanding that those funds be paid over to Polson?

"THE WITNESS: No."

(Tr. 580, l. 2, to 584, l. 2)

The above testimony was confirmed by Mr. Kirkwood.

"Q. (By Mr. Beighle) Did you offer to transfer the funds to Mr. Polson?

"A. Do you mean after we put it in a special account?

"Q. Yes.

"A. No.

"Q. Did they ask you for it?

"A. No."

(Tr. 517, ll. 18-24)

The appellant did not sustain its burden of proving facts to the contrary. The above testimony clearly establishes the conduct of the parties was such that there was no "demand" in the legal sense which would constitute

a ratification of the Rayonier-Jackson contract. Further, it is clear from the evidence that at no time was there any intention to ratify said contract.

3. Appellant contends Polson ratified the Rayonier-Jackson contract by filing a lawsuit against the Jackson Estate. However, appellant has again mistakenly concluded that the action included a claim for the contract proceeds. The suit against Anna Jackson, individually and as executrix, which was commenced after this action, did not include any claim for the proceeds from the logging of the Bumgarner Allotments. (Tr. 582-583)

The complaint, including the accountings attached, were drawn so the contract proceedings were not included. Paragraph 1 of the prayer for relief referred to the real property of the Joint Venture not the proceeds in question. Paragraph 2 of the prayer was the claim for moneys and was based on the accounting attached thereto as an exhibit. The references to the proceeds in the complaint were merely to establish the proper background for the court. The important fact is they were not included in the prayer for relief. The only clear statement on this point in the record was by Mr. Bush, the "author" of the complaint and the accounting. (Tr. 582-583) The appellants did not pursue it further and certainly did not establish or sustain their burden of proof on an affirmative defense that the proceeds were included in the suit.

Therefore, there is no necessity to consider any legal questions concerning whether such a lawsuit would constitute a ratification. The appellant has proceeded on mistaken interpretation of the documents and has not sustained its burden of proof on the facts. Clearly the court

adopted the interpretation advanced by appellee.

4. Appellant has contended the settlement of the lawsuit (Ex. A-20-B), and the escrow agreement (Ex. A-20-A), constitute an exercise of control over the funds thereby giving rise to ratification. This contention is unfounded.

The settlement agreement entered into between F. Arnold Polson and Anna A. Jackson in June, 1963 does not, in any way, affect any claim or cause of action which Polson now has or has at any time had against any other party, including appellant.

In the agreement with Anna A. Jackson, the only consideration given by Polson was a covenant not to sue. As specifically provided therein, the agreement was not intended as a release or discharge of, nor an accord and satisfaction with, any person whomsoever. It was further specifically provided the agreement could not be placed in defense of an action which is a breach of the covenant not to sue, and that the only remedy for such a breach would be an action for damages.

In *Hawber v. Raley*, 92 Cal. App. 701, 268 Pac. 943, 944 (1928), cited with approval in *Rust v. Schlaitzer*, 175 Wash. 331, 27 P.2d 571 (1933), the court stated:

“It would therefore appear to be a rule of construction that where two or more tort-feasors are involved and the document is such that the covenants may plead the same in abatement of any action which the covenantor might subsequently commence in breach of the obligation contained in said document and *the remedy thereunder is not restricted to an action on the covenant*, the document constitutes a release and satisfaction, and not a mere covenant not to sue.” (Emphasis added)

Implicit in this statement is the doctrine that if an action on the covenant is the only remedy, the agreement is a mere covenant not to sue. The Washington court is committed to this doctrine. See *Haney v. Cheatham*, 8 Wn.2d 310, 111 P.2d 1003 (1941). As stated by the Washington Supreme Court in *Rust v. Schlaitzer*, 175 Wash. 331, 336, 27 P.2d 571 at page 573 (1933):

“The distinction, in legal effect and consequences, between a covenant not to sue and a release is clear enough, but it is often difficult, in cases of tort, to determine whether an agreement falls within one category or the other. In classifying such an agreement, we may, so far as it effects joint tort-feasors, look to its consideration, its effect and the circumstances attending its execution.”

In the agreement between Polson and Anna A. Jackson, the consideration given in return for the covenant not to sue was the putting in escrow of monies paid by Rayonier for timber in question in this lawsuit. The escrow agreement provides that if the finding in the present action is that Polson is bound by the contract made between Jackson and Rayonier, the money is to be turned over to Polson. If such is found to be the case, Polson would be legally entitled to such funds as they would be partnership monies by reason of the judicial determination. The agreement, therefore, merely protects Polson's position as to the funds in case it is herein determined he is entitled to them and must thereby accept the Rayonier-Jackson contract. Under these circumstances, it could not reasonably be said that the putting of the funds in escrow was agreed or accepted as payment for any alleged tort. If Rayonier is found to have committed a tort, Polson would

not receive any funds from the escrow.¹ It is thus clear that in its language, intent, and legal effect the agreement is not a release for any tort claim nor an exercise of dominion by Polson. The sole purpose of the escrow agreement was to preserve the funds pending the outcome of this lawsuit. Where an agreement merely provides for a covenant not to sue one joint tort-feasor, there is no release of either joint tort-feasor. See *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616 (7th Cir. 1959); *Pellett v. Sonotone Corp.*, 26 Cal.2d 705, 160 P.2d 783 (1945). The agreement between Polson and Anna A. Jackson did not release Rayonier.

Further it should be noted all this took place after the commencement of this lawsuit, whereby Polson had already clearly elected to repudiate the Rayonier-Jackson agreement, and his subsequent actions to preserve the funds were obviously not a ratification of said contract.

PART III

Polson Is Not Estopped to Deny the Validity and Enforceability of the Rayonier-Jackson Contract.

Appellant has contended Polson is estopped by reason of his silence to deny the validity and enforceability of the Rayonier-Jackson contract. The specific finding of the court is pertinent:

“4. Polson was not aware of the existence of the

1. It should be noted that the trial court did allow a setoff in the amount of the funds in the escrow. And under a stipulation between the parties subsequent thereto, the funds were released to Polson, without prejudice to the positions of the parties herein. The Court noted that if the funds had been dissipated, he would have allowed a full recovery to Polson, inasmuch as Rayonier had no justifiable basis for paying the funds to Jackson's estate. However, since the funds had been preserved, the Court did allow appellant an offset to the extent thereof.

logging contract until the spring of 1961, and he did not have full knowledge of all material facts regarding the contract until July of 1961. Rayonier has not established that Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances, or that Polson's conduct misled or prejudiced Rayonier. Accordingly, Rayonier has failed to establish either its affirmative defense of Ratification or that of Estoppel." (R. 335)

The finding of the court that Polson did not have full knowledge until July of 1961 is important. Until Polson acquired such knowledge the duty to speak, if any, would not arise. Before estoppel can be asserted against Polson, it has to be established that he had actual knowledge of all material facts. As stated in *Consolidated Freight Lines Inc., v. Groenen*, 10 Wn.2d 672, 677, 117 P.2d 966, at page 968 (1941):

"Estoppel by silence does not arise without full knowledge of the facts, and a duty to speak on the part of the person against whom it is claimed."

The Washington Supreme Court concisely stated the limitations of this type of estoppel in *Blanck v. Pioneer Mining Co.*, 93 Wash. 26, 34, 159 Pac. 1077, at page 1080 (1916):

"Full knowledge of the facts is essential to create an estoppel by silence or acquiescence. . . . Mere silence, without positive acts, to effect an estoppel must have operated as a fraud, *must have been intended to mislead, and itself must have actually misled*. The party keeping silent must have known or had reasonable grounds for believing that the other party would rely and act upon his silence. *The burden of showing these things rests upon the party invoking the estoppel.*" (Emphasis supplied)

The court clearly held the appellant did not sustain its

burden of proof in this area. The facts actually preponderate against appellant's contentions. There are three basic areas to consider.

1. The party to be estopped must have full knowledge of all material facts.

As found by the court, Polson did not obtain full knowledge of the material facts until July of 1961. Thereafter, he would have a reasonable time in which to act. Therefore, the developments thereafter are the pertinent ones for consideration and these will be discussed below.

2. The silence must have been intended to mislead.

There is absolutely no evidence to establish any such intention on the part of Polson. Specifically, the court found the appellant Rayonier had not established that Polson's failure to inform appellant that Jackson had no authority to enter into the contract was unreasonable under the circumstances.

Until the entry of the Order in the Probate Court on July 12, 1961 confirming the Joint Venture status of certain properties (Ex. A-19-G), the right and title of Polson was being challenged and contested by certain of the heirs of Jackson. Thereafter, the work of investigating and marshalling assets continued. Throughout, Polson felt the prior notice to Rayonier (Ex. 6) was sufficient and he relied on the advice of his attorneys. (For citations to the record see Item (27) to specification of error 1.2.2 in the Appendix hereto.)

3. The silence must have actually misled and prejudiced appellant.

Here the evidence clearly preponderates against appellant. Substantially all of the logging was completed

prior to July 1, 1961. (R. 140) The roads were already constructed. The wrongful act had already been committed and for all practical purposes completed. Even if Polson had notified appellant Rayonier immediately after the entry of the order in the probate court on July 12, 1966, confirming the Joint Venture status of the property, there would have been no change in the expenses incurred by appellant and virtually no difference in the damages recoverable by Polson.

Also, it is important to note appellant made payments to Anna Jackson, as Executrix of the Estate of Jackson. Appellant knew the 1951 Joint Venture Agreement provided for payment to be made to Polson. Further, in the *usual* course of business, payments would be made to a surviving partner, not to the administrator of the Estate of the deceased partner.

This action is inconsistent with their assertion that, because Polson did not object or protest, appellant relied on the Rayonier-Jackson contract being a valid, binding contract against the Joint Venture of Polson and Jackson. If, in fact, Rayonier had done so, they would have contacted Polson and made the payments to him. Instead they continued to carefully avoid any contact with Polson. The following statement by the court is pertinent:

“It seems indisputably clear to me that Rayonier had absolutely no right to make these payments other than to Polson; that Rayonier not only had constructive or implied knowledge thereof, but that responsible officers of Rayonier actually knew, or in the exercise of even the slightest degree of concern for the rights of others should have known, that those payments under the relationship between Jackson and Polson were to be made to or at the direction

of Polson . . .” (R. 353-354)

Clearly Rayonier was not misled or prejudiced. Not only did appellant fail to sustain the burden of proof on the affirmative defense of estoppel, the evidence clearly preponderated to the contrary.

PART IV

Rayonier Is Within the Scope of the Treble Damage Trespass Statute, or, in the Alternative, the Treble Damage Waste Statute.

The appellant's primary argument in this area is that by reason of the Rayonier-Bumgarner contracts, Rayonier became a licensee of cotenant Bumgarner and as such cannot be guilty of trespass within the scope of the applicable statute. (R.C.W. 64.12.030) The argument is without merit both as a practical and legal matter. The unambiguous language of the statute clearly encompasses the wilful and tortious actions of the appellant.

Succinctly stated, there are three essential elements in the statute (R.C.W. 64.12.030):

1. “Whenever any person shall cut down . . . or carry off any tree, timber . . .”

Appellant has admitted doing so to the extent of 3,230,-360 board feet. (R. 140)

2. “. . . on the land of another . . .”

Appellant was not on its own land. The Bumgarner Allotments were and are owned jointly by Nina Bumgarner and Polson. Also, there is a distinction between land and timber. Any interest appellant may have acquired would have been in the timber not in the land. Further,

paragraph 6 of the regulations which are attached to and are a part of the underlying Crane Creek contract (Ex. 4) provides that title to the timber would not pass until paid for by the purchaser. Appellant did not acquire any title to the timber, under the contracts appellant claims are valid, until payment was made and this was after the trees were severed and removed from the allotments and after the unlawful entry and removal was committed.

3. “. . . without lawful authority . . .”

This is the primary requirement of the statute. Instead of restricting the statute to a particular form of action, the Legislature used the more encompassing but basic requirement of “. . . without lawful authority . . .”

The actions of appellant in entering onto the land and cutting and removing the timber were “without lawful authority” for the following reasons:

A. Polson, owner of an undivided interest in the land and timber, did not at any time consent in any manner to the cutting or to the entry upon the land. (Tr. 27) His consent was necessary before there could be a lawful entry or cutting.

B. Even if appellant was a “licensee” of Bumgarner, the cutting was still without lawful authority. If the cotenant Bumgarner had personally cut the timber without Polson’s consent, she would have been guilty of waste. She could not authorize another to do an act which she herself could not lawfully do.

C. The Bumgarner-Rayonier contracts, or the performance thereof, were necessarily conditional upon the appellant obtaining the consent of the remaining cotenant

Polson for the appellant's entry upon the land and cutting of timber. This consent was never obtained, even though the appellant has admitted it was at all times fully aware of this requirement. (Tr. 209-212)

The above points will be discussed in order.

A. Polson Did Not Consent to the Cutting of the Timber.

Appellant Rayonier cut the timber without lawful authority. Polson, owner of an undivided interest in the land and timber, did not at any time consent to the cutting or to the appellant entering upon the land. His consent was necessary before there could be a lawful entry or cutting. The evidence so clearly established that Polson's consent was not obtained, and the Rayonier-Jackson contract was unauthorized, it need not be considered further at this point. The issue on this point involves questions of Jackson's "inherent authority," if any, and this issue has been considered separately herein.

B. Even If Appellant Rayonier Was a Licensee, It Did Not Acquire "Lawful Authority" to Cut the Timber.

1. A grantee-licensee cannot acquire greater rights than his grantor-licensor.

A grantee-licensee (Rayonier) cannot acquire any greater rights than its grantor-licensor (Bumgarner). As will be shown herein, Bumgarner could not lawfully cut without Polson's consent, and accordingly could not license appellant to cut without Polson's consent.

The appellant has cited and relied heavily upon two

cases,¹ wherein the court held the cotenant or his licensee was not liable under a treble damage trespass statute. Each is clearly distinguishable. The *Fitzhugh* case involved the acts of the cotenant himself and the narrow question before the court was whether the acts of a cotenant would constitute "trespass." The court concluded there was no trespass by a cotenant upon common property.² The *Buchanan* case involved a licensee of a cotenant and more closely parallels the situation here. However, this was in a jurisdiction where a cotenant apparently does have the right to unilaterally cut the timber, and, therefore, it would logically follow, could lawfully authorize a third party to cut. The critical factor in the *Buchanan* case was the determination that the cotenant had the right to cut trees on the common property. The court treated standing timber as part of the revenue and income of the common property and not part of the corpus or realty.³ It then reasoned the cotenant had a right to avail himself of such revenue and income. If the court had determined that the cotenant did not have such a right, then the licensee would have been guilty of trespass.

2. A cotenant commits waste when he cuts timber from the common property without the consent of the other cotenant.

There are numerous cases which hold a cotenant cannot cut timber on the common property, without the con-

1. *Buchanan v. Jencks*, 38 R.I. 493, 96 Atl. 307 (1916); *Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8 (1922).

2. The case did not discuss waste and does not disclose whether Arkansas had a statute covering actions by the cotenant.

3. The importance of the treatment of standing timber as personalty rather than realty is discussed subsequently herein.

sent of the other cotenants. If he does so, he is guilty of waste.¹ The case of *Provident Life & T. Co. v. Wood*, 96 W.Va. 516, 123 S.E. 276 (1924) is a prominent case cited for the general rule that:

A cotenant has no right, without the consent of the other co-owner to cut and remove the timber growing upon a large area owned in common; to do so is waste for which he is responsible; nor may he confer that right upon another.

Obviously, this rule is of paramount importance where the only use of the land is the growing of trees.

In its simplest form, the basic question is: Does a cotenant (tenant in common) in the State of Washington have the right to enter onto the common property and cut and remove the standing timber without the consent of the other cotenants? We submit he clearly does not have such right. Although a cotenant in fee simple might not be subject to the treble damage waste statute, the actions would still constitute waste, and would be unlawful.

In many jurisdictions, the remedy for the commission of waste by a cotenant is accounting (or in effect single damages) instead of treble damages. However, the fact remains the conduct was wrongful, i.e., unlawful. See *Fitzhugh v. Norwood*, 153 Ark. 412, 241 S.W. 8 at page 9 (1922), wherein the court said:

“On land owned by several persons as tenants in common, neither of the owners is a trespasser. There

1. For a few of the cases so holding see: *Nevels v. Kentucky Lumber Co.* (Ky.), 56 S.W. 969 (1900). *Guest v. Guest* (Ala.), 176 So. 289 (1937). *Benedict v. Torrent* (Mich.), 47 N.W. 129 (1890). *Layne v. Layne*, 177 Ky. 592, 197 S.W. 1062 (1917). *Shepard v. Pettit*, 30 Minn. 119, 14 N.W. 511 (1883). *Clark v. Whitfield* (Ala.), 105 So. 200 (1925).

is, of course, a remedy in the laws for any wrongful act committed by either of the tenants against the rights and interests of the others. Where one of the owners wrongfully commits waste by cutting the timber, or otherwise, the other owners have a remedy for the actual damages; or where the removed timber is converted into finished product and sold, there may be a recovery for the value of such finished product, less the cost of manufacture."

In this connection, the following quotes from FALK, *TIMBER AND FOREST PRODUCTS LAW*, page 99, are pertinent:

"A number of respectable authorities on timber law refer to the right of a co-owner to remove his share of the timber. Two early California cases are usually cited as authority for that conclusion. However, the two California cases are most informal on that point, and should not be seriously considered. It should be obvious that a person owning 40 per cent of certain timber, whether the land is included or not, cannot fairly remove his 40 per cent. Particularly considering the quality factor involved in timber, it would be impossible to determine when 40 per cent or any other percentage had been removed. Moreover the rights of co-owners are existent in each tree, *and no one has a right to make his own segregation or partition.*

"It is considered wrongful for a co-owner to harvest and sell the timber, regardless of whether that is called waste or not . . ."

The Washington court in *Crodle v. Dodge*, 99 Wash. 121, 168 Pac. 986 (1917), held the removal of timber by a cotenant constituted waste. The remedy allowed was an accounting and there was no mention of treble damages. However, it appears from the briefs filed that there was no prayer for treble damages. In any event, the court clearly held the cutting by one co-owner without the consent of the other co-owner was unlawful, i.e., waste.

And as previously stated, it follows that a co-owner cannot properly authorize a third person to do something he himself cannot lawfully do.

Although many of the cases and authorities cited to the court would appear to be in conflict, there is one basic factor which provides a basis of differentiating. In the cases where the court held the cutting of timber by the licensee did not constitute trespass, or the cutting of timber by the cotenant did not constitute waste, the standing timber was treated as personalty, as part of the revenue or income of the property. For example, the *Buchanan* case, *supra*, the *Kirby Lumber Co.* case and *Freeman on Cotenancy and Partition*, Sec. 253 (Cited on pages 74-76 of appellant's brief) are based on the premise that timber is personalty which the cotenant is entitled to use and enjoy as part of the revenue or income of the property. In the cases holding to the contrary, the court has regarded standing timber as part of the corpus, as realty, of which one cotenant cannot deprive the other cotenant, without his consent.

Under Washington law, standing timber is realty. See *Dowgialla v. Knevage*, 48 Wn.2d 326, 294 P.2d 393 (1956), and cases cited therein as establishing this principle. Accordingly, the Washington court treats the cutting of timber by one cotenant, without the consent of the other, as waste. See *Crodle v. Dodge*, *supra*. The cotenant cannot lawfully authorize a licensee to do any act which the cotenant could not lawfully do. Under the facts of this case, the "licensee" (appellant) has under the R.C.W. 64.12.030 cut and removed timber from the land of another without lawful authority and its acts do fall within the scope of the statute.

3. One cotenant cannot grant an easement or right-of-way without the consent of the other cotenant.

In addition to the question of authority of a cotenant to sell the timber located on common property or to contract for its cutting, there is the problem of Bumgarner granting an easement or right-of-way to Rayonier to enter onto the land for the purpose of cutting the timber. The following language is contained in the Powers of Attorney (Exs. 7 and 8) executed by the cotenant Nina Bumgarner:

“ . . . I do also hereby agree to grant any contractor holding any contract hereunder and in conformity herewith, reasonable right of way over the above described, or any other lands in which I hold any interest. . . . ”

The rule is well established that one cotenant cannot, as against the other cotenants, convey an easement or right-of-way over the common property. While the cotenant could perhaps sell her undivided interest in the timber, she could not, without the consent of the other cotenant, create a right-of-way to enter on the land to cut the timber. Sec. 20 AM. JUR 2nd *Cotenancy*, Sec. 103.

Accordingly, Bumgarner could not validly create an easement or right-of-way in favor of appellant to enter onto the property. The entry itself was a trespass.

4. The legal result advanced by appellant would allow a cotenant to use an unreasonable form of self-help.

The appellant's approach would allow a cotenant to use a form of self-help, despite the availability of the judicial processes of partitionment. This would place the legal relationships between cotenants of timberlands in the State of Washington in chaos. For example, Polson is

the owner of an undivided 1-576th interest in an allotment of timberlands in the same general area as the property involved in this lawsuit. If the legal theory advanced by appellant is valid, then it would follow Polson could proceed to contract with and have someone cut all the timber on the allotment without the consent of the owner, or owners, of the other undivided 575/576ths interest. The only restriction would be that the purchaser agreed to pay a proportionate share of the purchase price to such other owner or owners. This in effect would amount to a right on the part of one co-owner to force a sale upon the other co-owner. One of the basic purposes of the treble damage trespass statute is to prevent just such a result. As stated by the court in *Guay v. Washington Natural Gas Co.*, 62 Wn.2d 473, 476, 383 P.2d 296 at page 298-299 (1963):

“ . . . in stating the purpose of the statute as two fold, to punish a voluntary offender and also to provide, by trebling the actual present damages, a rough measure for future damages, as was done in *Harold v. Toomey*, 92 Wash. 297, 158 Pac. 986, we are aware of the statute's third and additional purpose: To discourage persons from carelessly or intentionally removing another's merchantable shrubs or trees on the gamble that the enterprise will be profitable if actual damages only are incurred. *One ought not to be able to create a profitable buyer-seller relationship wilfully or carelessly, where the seller is neither consulted nor willing.*”

Further, the “self-help” result advanced by appellant is totally unnecessary. A co-owner can have the property partitioned by legal process and then sell his portion free and clear, leaving the portion allotted to the other co-owner unaffected. This demonstrates the inherent

weakness of appellant's arguments. Where, as here, a party wilfully proceeds without the consent of the remaining co-owners, or without following the legal process of obtaining judicial partition if the consent cannot be obtained, then treble damages should be, and were, properly imposed.

C. The Bumgarner-Rayonier Contracts, or the Performance Thereof, Were Necessarily Conditional Upon Appellant Obtaining Polson's Consent.

Appellant has relied heavily upon its position as a "licensee" by virtue of the Bumgarner-Rayonier contracts. However, under the facts, appellant did not become a "licensee" by reason of said contracts. These contracts with the Indian Service on behalf of Nina Bumgarner, the owner of an undivided one-half interest, or the performance thereof, were contingent or conditional upon obtaining the consent or participation of the owners of the other undivided one-half interest in the Bumgarner Allotments, and the execution by said owners of a similar timber cutting contract. Appellant Rayonier was fully aware of the necessity of obtaining such consent or participation before it could properly and lawfully proceed. This was clearly established by the following evidence introduced through cross-examination of appellant's own witnesses, Mr. Libby of the Indian Service and Mr. Vincent, head of appellant's land department.

"Q. Mr. Libby, did you or the Indian Service contemplate or intend that Rayonier could log the Bumgarner Allotments without actually obtaining a contract with or the consent of the owner of the unrestricted undivided interest in the Bumgarner Allotments?

"A. No." (Tr. 409, l. 25 through 410, l. 5)

(MR. LIBBY):

"Q. Did you advise Rayonier that it would be up to them to enter into a contract with the owner of the unrestricted portion?

"A. Yes." (Tr. 404, ll. 11-14)

(MR. VINCENT):

"Various methods had been considered, and including the sale you mentioned, or the proposed sale, and finally appeared that the most practical way would be by including it under the terms of the contract, and he [Mr. Libby] asked me if Rayonier would be willing to accept it—these allotments under the terms of the contract with respect to the restricted half interest.

"Q. And what did you advise Mr. Libby at that time?

"A. I told him that we would certainly be willing, but that it would be useless gesture as far as any relief to Mrs. Bumgarner was concerned, unless the unrestricted half interests were likewise willing to have the allotments logged.

"Q. And the unrestricted half interest would be the Polson-Jackson interest?

"A. Yes." (Tr. 209, l. 13 through 210, l. 3)

(MR. VINCENT):

"A. I don't think that I testified that we would refuse to accept them under the contract. I indicated that it would be not a practical thing as far as Mrs. Bumgarner is concerned to expect to receive any income from this property unless the alienated interest was likewise willing to be included under the contract.

"Q. (By Mr. Howard) Was it your position, then, that you would not be in a position to log the allotment until an agreement was reached with the unrestricted interest?

“A. Yes.” (Tr. 212, ll. 12-23)

It is evident appellant knew it could not lawfully proceed to log without first obtaining the valid consent of the Polson-Jackson Joint Venture. The Rayonier-Bumgarner contracts did not give appellant any “license” to proceed without such consent. This is the reason for the court’s addition to “Not to be contested fact No. 8.” The Indian Service was not in a position to authorize Rayonier to proceed without first obtaining the requisite consent. The true issue is the effect of the Rayonier-Jackson contract. Appellant has contended Jackson had the authority, either apparent or inherent, to commit the unrestricted ownership. The trial court, after carefully reviewing the evidence, found to the contrary. The argument on this issue has already been stated herein.

PART V

Rayonier’s Conduct Was Not Such as to Give Rise to Statutory Mitigation of Damages

Appellant has asserted only single damages should have been allowed on the ground R.C.W. 64.12.040 is applicable. This statute sets forth what will be regarded as mitigating circumstances and provides only single damages will be recovered where the trespass was casual or involuntary or in a good faith, but mistaken, belief of a right to cut.¹

1. R.C.W. 64.12.040: “If upon trial of such action it shall appear that the *trespass was casual or involuntary or that the defendant had probable cause to believe that the land on which such trespass was committed was his own, or that of the person in whose service or by whose direction the act was done, or that such tree or timber was taken from unenclosed woodlands, for the purpose of repairing any public highway or bridge upon the land or adjoining it, judgment shall only be given for single damages.*” (Emphasis supplied)

The trial court after having reviewed all the evidence made the following statements in its oral opinions.

“After full consideration of the evidence and the briefs and the authorities, I am satisfied that a preponderance of the evidence shows that all of the elements to establish a right of recovery by plaintiff for treble damages under R.C.W. 64.12.020 and/or in the alternative treble damages for cutting timber on the lands of another person without authority under R.C.W. 64.12.030, have been fully established, and judgment should be for plaintiff unless precluded by one or more of the defendant’s affirmative defenses.” (R. 340-1)

“Any extended dissertation on the several facets of the question would take an extended statement. Viewing the situation as a whole, considering that recovery is for a *wrongdoing*, which the court has found and is fully satisfied *was totally unjustified on the part of Rayonier. . .*” (Emphasis supplied) (R. 353)

In this instance, the trial court is the finder of fact, and the above finding, which eliminates the availability of R.C.W. 64.12.040 to appellant, should not be disturbed unless clearly erroneous. Appellant has certainly not established it is “clearly erroneous.” The burden is on the appellant to show that its acts were excusable, and the appellant failed to do so.

There are several Washington cases which have upheld the treble damages where the defendant was willfully negligent, or intentionally proceeded where there was some question as to the right to do so. See *Heybrook v. Index Lumber Co.*, 49 Wash. 378, 95 Pac. 324 (1908); *Nethery v. Nelson*, 51 Wash. 624, 99 Pac. 879 (1909); *Northern Pacific Railway Company v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453 (1909); *Mullally v. Parks*, 29 Wn.2d 899, 190 P.2d 107 (1948).

At a minimum, appellant was grossly negligent in proceeding as it did in spite of the warning by Polson in the June 1, 1954 letter and the other facts known to appellant without contacting Polson to obtain his consent.

PART VI

Polson Recovery Is Not Limited by Reason of Any Interest of Jackson in the Joint Venture.

Appellant has argued the recovery should be limited by reason of Jackson's "interest" in the Joint Venture. However, there are several basic factual premises used by the appellant which are erroneous.

Contrary to the argument of the appellant, neither Jackson nor Jackson's estate had any real claim to any proceeds from this particular investment. The "profit," if any, was not to be determined parcel by parcel. This was made clear by paragraph 4 of the 1957 Joint Venture Agreement. (Ex. 2) Jackson would not have had any claim to any proceeds until Polson was fully reimbursed for all advances and expenses, and, in light of the large embezzlement by Jackson, this will never occur.

The court recognized the above construction of the agreement when, in the oral opinion, it stated with respect to this issue:

"... the terms of the joint venture agreement and the addenda thereto, and the practices of the parties make it very clear all Jackson was to have out of the joint venture business was a share in whatever profits might result from it. It was also made emphatically clear that Polson was to be fully reimbursed for funds expended by him before any consideration to be given to a distribution of profits to Jackson. I am

satisfied on the whole issue that the recovery should be for the full amount of the single damages in the amount stipulated, and that will be the ruling of the court.” (R. 353)

It became abundantly clear after Jackson’s death, that in light of the extensive amount of money he had embezzled, Polson never would be fully reimbursed and at no time will there be any “profits.” This was established by the following statement by John H. Kirkwood, attorney for Anna Jackson, Executrix, in the Petition for Authorization to Enter into Settlement in the Jackson Estate, (Ex. A-19-B), which statement was verified.

“In the opinion of counsel and the executrix, the ultimate result of said action, even after giving consideration to reductions in amounts, would be a judgment far in excess of the present assets of the estate, including the value of any possible and/or potential interests in the assets of the joint venture.”

Jackson embezzled or misappropriated over \$250,000 from the Joint Venture. (See page 6 of Ex. A-19-D) Actually, until the amount of \$550,287.07 representing reimbursable expenditures were recovered by way of proceeds, Jackson would not have participated in any proceeds. In the accounting filed in the Estate of Jackson, an appraised value was placed on the properties. Using the appraised value as a sale figure, Polson would still have been entitled to reimbursement in the amount of \$319,774.20. The losses will never be recovered or “reimbursed.” Therefore, appellant has incorrectly tried to treat one-half of the recovery herein as belonging to Jackson as profit.

PART VII

Plaintiff Is Entitled to Interest on the Compensatory Portion of the Damages

Basically, appellant has argued interest is not allowable on the single damages because the amount is unliquidated and punitive damages are involved here.

While the general rule is that interest is not allowable on unliquidated damages, the trend has been to treat the damages in trespass or conversion cases as liquidated.¹ As stated by the Washington Supreme Court in *Grays Harbor County v. Bay, etc.*, 47 Wn.2d 879, 891, 289 P.2d 975 (1955) at page 982:

“As stated in 36 A.L.R.2d 337, at pp. 348, 349, the general rule in actions of trover and conversion is that interest is allowed from the date of conversion. Considering the fact that the plaintiff has been deprived of the use of his property or its proceeds, the rule seems to us to be a salutary one.”

The above case, although a conversion action, involved the cutting of timber and the court *rejected* the argument that interest was not allowable since the amount was unliquidated. The court therein cited several Washington cases where the value had been established by opinion evidence and in each instance interest was allowed from the date of taking or conversion. See: *McSor-*

1. The Trial Court recognized this trend when it stated:

“My opinion is that the trend towards allowing interest on recovery for the conversion or misappropriation of personal property, even though it have no then fixed or determined value when it can be determined upon expert opinion testimony, and the like, is so strong and nationwide there is no doubt in my mind that when precisely and squarely presented to the Washington Supreme Court, it will follow this trend whether or not in the past it has indicated such a ruling.” (R. 349)

ley v. Bullock, 62 Wash. 140, 113 Pac. 279 (1911), *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364 (1913), *Wylde v. Schoening*, 96 Wash. 86, 164 Pac. 752 (1917), *Smith Co. v. Hardin*, 133 Wash. 194, 233 Pac. 628 (1925), *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 116 P.2d 315 (1941). The same rule applies with respect to trespass or waste situations. Specifically, with respect to trespass, the following statement is made in 36 A.L.R.2d 337, at page 397:

“It appears to be well settled that in actions of trespass for injury to or destruction of real or personal property, interest may be allowed as part of the damages.”

The cases cited in the above annotation indicate this rule has been adopted in 27 jurisdictions, with only three to the contrary. The *Grays Harbor County v. Bay* case, *supra*, is the closest Washington case we have located.

With respect to the question of interest where treble damages are involved, the appellant has stressed too greatly the penalty aspect. The fact that a “penalty” is involved does not mean the basic principles of damages are changed. To compensate the plaintiff for the loss of his property by reason of the appellant’s wrongful act he should receive the value of the property plus interest to cover the intervening time.

The special statutory aspect is separate. Only two-thirds of the recovery awarded is because of the statutory provisions. The court did not allow interest on this portion, but restricted the interest to the single damage portion.

The treble damage trespass statute R.C.W. 64.12.030 provides in pertinent part:

“ . . . if judgment be given for the plaintiff, it shall be given for treble the amount of the damages claimed or assessed therefore, as the case may be.”

Appellee advanced the argument that under the statute single damages, including interest, should be trebled. The trial court rejected this argument since it, *in effect*, would allow interest on the punitive portion of the award. Therefore, the court only allowed interest on the compensatory single damages.

Appellant has cited the dicta in the Washington case of *Blake v. Grant*, 65 Wn.2d 410, 411, 397 P.2d 843, 844 (1964) as indicating that interest should not be allowed. To the contrary, the court therein has in the following statement, which is the dictum referred to by appellant, apparently approved the method used by the trial court herein of delineating between the compensatory and the punitive damages:

“In the instant case, the trial court allowed interest from the date of conversion *upon the punitive two-thirds portion of the award as well as the compensatory one-third part*. It is recognized that the *Grays Harbor* case, *supra*, was not an action for treble damages; that our statutory action for treble damages is in the nature of a penalty . . . ; and that interest is generally disallowed on *punitive damages*. 15 Am. Jur. Damages, Sec. 299, p. 742. However, since counsel for the appellants has not presented this point, and the amount involved is very small, we do not decide the question.” (Emphasis supplied)

The interest allowed herein was only on the compensatory one-third of the award.

Appellant has cited *McCloskey v. Ryder*, 138 Pa. 383, 21 Alt. 148 (1891) to advance for two propositions: (1) No interest is allowable on punitive damages; and (2) the

statutory recovery is limited to treble the value of the trees, whereas the common law remedy allows single damages plus interest. On the first point we again state the trial court allowed interest *only* on the compensatory one-third portion. Interest was not allowed on the punitive damages. On the second point, the Pennsylvania court in the above case was merely restating the words of the particular statute involved. The Pennsylvania statute specifically provided that the recovery would be for three times the value of the timber cut and converted and double the value of the timber cut down and left on the ground. The Washington Statute does not so limit the recovery.

PART VIII

The Trial Court Entered Adequate Finding of Fact and Conclusions of Law.

It is important to note what has been entered in the way of findings and conclusions. The 54 Admitted Facts (R. 133-140) were incorporated by reference. The 10 Facts Not to Be Contested (R. 141-142) were incorporated by reference with a specific finding added to Fact Not to Be Contested No. 8 (R. 335). In addition, the court made two important findings (R. 335) and then incorporated by reference his four oral opinions wherein the issues were thoroughly discussed. The use of memorandum opinions to set forth Findings and Conclusions is entirely proper. The oral opinions (R. 337-367) are extensive.

The appellant would have the court enter findings on a mass of details. Further, a large segment would deal with appellant's affirmative defenses, which the court held

were not established by a preponderance of the evidence. This failure of proof, of necessity, creates a negative situation wherein it is extremely difficult to enter other than "ultimate" type findings.

The statement by the court in connection with appellant's request for additional findings was correct:

"All others of the additional findings seem to me to fall into either of two classes; one, a matter that I have made all the findings that this case requires, or, secondly, relates not to ultimate facts or even essential facts but to details sufficiently covered by the findings I have previously made." (R. 358)

The following statement by the court on this subject was also sound:

"After considerable examination of the proposed findings offered by both plaintiff and defendant, tentatively, at least, I believe under the civil rule pertaining to the making an entry of Findings of Fact and Conclusions of Law in support of judgment, the admitted facts in the pretrial order and what I have now stated of record, on this occasion and previously, covers all of the essential and ultimate facts necessary to be found and specifically included in formal findings keeping in mind that findings as to minutia are not contemplated by the rule." (R. 344)

The court did give the parties an opportunity to request additional specific findings. Appellant did so by motion. The discussion between counsel and the court on this point is pertinent. (See R. 361-366)

Taking into account the whole of the 54 Admitted Facts, the 10 Facts Not to Be Contested, the additional specific findings of the court, and the four oral opinions of the court, the Findings and Conclusions contained therein are more than adequate.

CONCLUSION

Appellant has stated this is a strange case. However, the strangeness arises from the conduct of Appellant Rayonier. Despite the specific warning from Polson as to the limitations or restrictions on Jackson's authority, and despite Rayonier's knowledge as to Polson's interest in the property, Appellant Rayonier proceeded to deal with Jackson and after his death to cut the timber, without once communicating with Polson. Rayonier's conduct is indeed strange and unwarranted. As stated by the District Court:

“Viewing the situation as a whole, considering that the recovery is for a wrongdoing, which the court has found and is fully satisfied was totally unjustified on the part of Rayonier. . . .” (R. 353)

Appellant tried to overcome the above by means of certain affirmative defenses. However, as to each the appellant failed to sustain its burden of proof.

The judgment of the District Court should be affirmed.

Respectfully submitted,

RYAN, ASKREN, CARLSON, BUSH & SWANSON
RICHARD J. HOWARD
RICHARD K. BUSH

Attorneys for Appellee

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

RICHARD J. HOWARD

RICHARD K. BUSH

Of Counsel for Appellee

APPENDIX

**Citations in Support of Findings and Conclusion
Challenged by Appellant.****Specification 1.1. F. & C. No. 4 (R. 335)**

"4. Polson was not aware of the existence of the logging contract until the spring of 1961, and he did not have full knowledge of all material facts regarding the contract until July of 1961. Rayonier has not established that Polson's failure to inform Rayonier that Jackson had no authority to enter into the contract was unreasonable in the existing circumstances, or that Polson's conduct misled or prejudiced Rayonier. Accordingly, Rayonier has failed to establish either its affirmative defense of Ratification or that of Estoppel."

The following admitted facts and testimony support the above finding with respect to when Polson acquired certain knowledge.

Admitted Facts:

48 (R. 140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
159	24		160	21
163	17		165	1
178	21		178	25
494	19		495	1
497	11		497	22
499	22		500	1
515	3		515	24
549	18		550	23
620	11		621	3

The following exhibits, admitted facts and testimony support the above finding with respect to the fact that Polson's failure to notify Rayonier was not unreasonable

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in the circumstances and did not mislead or prejudice Rayonier.

Exhibits:

6 Registered letter from Polson to Rayonier dated June 1, 1954.

29 Letter dated November 15, 1960 from Len Forrest to Anna Jackson.

A-19-F Executrix Deed

A-19-G Order Confirming Joint Venture Status of Certain Properties

A-19-L Petition for Order Confirming Joint Venture Status of Certain Assets

A-20-A Escrow Agreement

Admitted Facts:

1, 48, 49, 51 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
26	3		27	19
159	24		167	23
174	23		180	20
206	21		208	5
218	8		220	24
280	7		280	20
285	5		285	7
294	10		296	14
298	8		299	25
510	13		511	4
515	3		515	23
521	17		523	2
536	10		538	13
557	19		558	17
572	22		574	20
583	3		583	11

Specification 1.2.1. F. & C. No. 5, Ex. B (R. 340-1)

“After full consideration of the evidence and the briefs and authorities, I am satisfied that a preponderance of the evidence shows that all of the elements essential to establish a right of recovery by plaintiff for treble damages under R.C.W. 64.12.020 and/or in the alternative treble damages for cutting timber on the lands of another person without authority under R.C.W. 64.12.030, have been fully established, and judgment should be for plaintiff unless precluded by one or more of the defendant’s affirmative defenses.”

To facilitate consideration of particular portions of the evidence in support of the above finding, a series of conclusions are set forth below and pertinent exhibits, admitted facts and portions of the testimony are cited in support of each. The following are not all of the factors involved in the above finding, but are those particularly directed at the reasons stated by the appellant in contending the above finding is in error:

(1) The logging operations on the Bumgarner Allotments, and the removal of timber therefrom, were not done by Rayonier in good faith and Rayonier did not have probable cause to believe that in doing so it was acting under full and proper claim of right.

Exhibits:

- 1 1951 Joint Venture Agreement
- 2 1957 Joint Venture Agreement
- 3 Declaration of Trust
- 5 Letter Agreement dated April 19, 1954
- 6 Registered Letter from Polson to Rayonier dated June 1, 1954

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- 15 Rayonier-Jackson Contract
- 27 Map
- 33 Vouchers for payments by Rayonier to Jackson

Admitted Facts:

1, 15, 16, 23, 28, 29, 30, 35, 36, 37, 38, 39, 42, 43, 44, 45, 46, 48, 50 and 51 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
189	14		191	20
195	18		195	22
197	20		197	23
198	1		199	3
200	19		200	25
269	11		269	20
271	8		271	13
273	5		274	6
276	20		277	6
280	7		280	20
203	13		204	18
212	13		212	25
218	7		220	25
226	18		227	13
227	24		228	18
238	7		245	23
248	8		248	25
249	25		250	25
252	20		260	21
266	15		268	18
281	8		285	19
293	8		293	14
294	10		296	24
298	8		299	6
299	6		300	25
304	10		309	7
600	9		600	17
601	6		601	9
603	11		604	22

(2) Jackson was acting outside the scope of his authority, whether apparent, actual or inherent, when he negotiated with Rayonier, Nina Bumgarner and the Bureau of Indian Affairs with respect to logging of timber on the Bumgarner Allotments, and when he executed the Addendums and the Jackson-Rayonier Contract.

Exhibits:

- 1 1951 Joint Venture Agreement
- 2 1957 Joint Venture Agreement
- 3 Declaration of Trust
- 5 Registered Letter from Polson to Rayonier dated June 1, 1954

Admitted Facts:

1, 15, 16, 28, 29, 35, 36, 37, 39, 44, 48 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
51	5		51	16
58	23		59	5
65	24		67	8
74	1		75	1
493	9		493	17
620	11		621	3

(3) The course of conduct and dealing of Polson and Jackson was not such as to give Jackson the apparent authority to contract for the cutting of timber on the Bumgarner Allotments.

In addition to the foregoing citation in (1) above, particular reference should be made to:

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Page	Line	through	Page	Line
64	25		65	7
280	7		280	12
285	5		285	7
620	11		620	14

(4) Polson had no knowledge of and did not consent to Jackson's actions in negotiating for or executing the Addendums and the Rayonier-Jackson contract. Polson did not in any manner consent to the Rayonier-Jackson contract, either before or after its execution. Said contract was unauthorized.

Exhibits:

- 6 Registered Letter from Polson to Rayonier dated June 1, 1954
- 9 Addendum
- 10 Addendum
- 15 Rayonier-Jackson Contract

Admitted Fact:

48 (R. 140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
163	17		165	1
176	10		178	21
179	14		180	24
494	19		495	1
497	11		497	22
499	22		500	2
620	11		621	3

(5) The Rayonier-Bumgarner contract or the performance thereof was contingent or conditional upon obtaining the consent or participation of the owners of the other un-

divided one-half interest in the Bumgarner Allotments, and the execution by said owners of a similar timber cutting contract. Said consent or participation was not obtained. Rayonier was aware of the necessity of obtaining such consent and the fact that it was not obtained.

Exhibits:

- 25 Letter dated March 19, 1954
- 35 Affidavit of John W. Libby

Transcript:

Page	Line	through	Page	Line
209	13		210	3
212	3		212	25
404	11		404	14
409	25		410	5

Specification 1.2.2 F. & C. N.O. 5, Ex. B (R. 341)

“Each of the several defenses has been carefully considered in the light of the facts I find shown by a preponderance of the evidence, I considered credible, and, of course, in view of the controlling authorities, in my opinion, the evidence actually preponderates against the defenses of estoppel, ratification, and apparent authority, but at a minimum I must find, because I sincerely believe it to be correct, that there is not a preponderance of the evidence to sustain any of the affirmative defenses.”

To facilitate consideration of particular portions of the evidence in support of the above finding a series of conclusions are stated below and pertinent exhibits, admitted facts, and portions of testimony are cited in support of each. The following are not all of the factors involved in the above finding, but are those particularly directed at the reasons stated by appellant in assigning error to

said finding. The citations under specification of error 1.2.1 are also pertinent.

(1) Jackson was acting outside the scope of his authority, whether apparent, actual or inherent, when he negotiated with Rayonier, Nina Bumgarner and the Bureau of Indian Affairs with respect to logging of timber on the Bumgarner Allotments, and when he executed the Addendums and the Rayonier-Jackson Contract.

Exhibits:

- 1 1951 Joint Venture Agreement
- 2 1957 Joint Venture Agreement
- 3 Declaration of Trust
- 5 Registered Letter from Polson to Rayonier dated June 1, 1954

Admitted Facts:

- 1, 15, 16, 28, 29, 35, 36, 37, 39, 44, 48 (R. 133-140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
51	5		51	16
58	23		59	5
65	24		67	8
74	1		75	1
493	9		493	17
620	11		621	3

(2) The 1951 Joint Venture Agreement provided that sales could be made as agreed upon by the parties, and all proceeds thereof were to be paid to Polson. Rayonier had obtained a copy of this agreement and knew its terms prior to and at the time of the execution of the Rayonier-

Jackson contract. In addition the 1951 Joint Venture Agreement was filed for public record on June 4, 1953 in the Grays Harbor County Auditor's office.

Exhibits:

- 1 1951 Joint Venture Agreement
- 30 Notes from Rayonier files relating to 1951 Joint Venture Agreement

Admitted Facts:

29, 35 (R. 136-137)

Transcript:

Page	Line	through	Page	Line
219	9		219	21
227	18		228	8
256	7		256	20
257	17		257	21
258	2		260	21
267	22		268	8
617	25		618	2

(3) Cleveland Jackson and Anna A. Jackson, his wife, acknowledged in writing that he held title to the undivided one-half interest in the Bumgarner Allotments, as trustee only, for the Polson-Jackson Joint Venture under the terms of the 1951 Joint Venture Agreement, and that he was without power to sell, exchange, convey, mortgage or otherwise encumber or contract in respect thereto except with the express consent of Polson.

Exhibits:

- 1 1951 Joint Venture Agreement
- 3 Declaration of Trust

Admitted Facts:

15, 16 (R. 135)

(4) Rayonier knew or should have known of the existence and terms of the Declaration (Item No. (3) above). Said Declaration was filed for public record on May 5, 1954 in the Grays Harbor County Auditor's office.

Exhibit:

3 Declaration of Trust

Admitted Fact:

16 (R. 135)

Transcript:

Page	Line	through	Page	Line
14	20		17	9
203	17		204	2
618	3		618	5

(5) By letter dated April 19, 1954, written by Rayonier to Jackson, and signed by both parties, an Agreement was recited with respect to rights of ways over certain parcels of land, including therein the Bumgarner Allotments. The information was supplied by Jackson, and Rayonier subsequently became aware of several inaccuracies in said information. In particular, the Bumgarner Allotments are listed as full ownership instead of an undivided one-half interest and it is listed as Jackson ownership instead of Polson-Jackson Joint Venture property. Forrest participated in the preparation of this Agreement.

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Exhibits:

5 Letter Agreement dated April 19, 1954

Admitted Fact:

27 (R. 136)

Transcript:

Page	Line	through	Page	Line
19	10		19	16
252	20		254	11
266	17		267	1

(6) By registered letter dated June 1, 1954, written by Polson to Rayonier, and received by Rayonier on or about June 2, 1954, notice was given to Rayonier that as to certain lands, including the Bumgarner Allotments, Jackson held title as trustee only, that Jackson did not have authority to enter into a contract such as Exhibit 15 and that the agreement referred to in Number 5 above was unauthorized, and if Rayonier wished to negotiate with respect to said land, Polson, upon being contacted, would be available to negotiate. Forrest was advised that Polson had objected to said agreement (Ex. 5) and the right of way plan would be dropped.

Exhibit:

6 Registered Letter from Polson to Rayonier dated June 1, 1954

Admitted Fact:

28 (R. 136)

Transcript:

Page	Line	through	Page	Line
22	6		24	18
254	20		254	21
306	13		309	8

(7) The 1957 Joint Venture Agreement provided that any sale, liquidation, lease, or other disposition of any interest in timber lands would be undertaken by Polson, but only with the approval of Jackson.

Exhibit:

2 1957 Joint Venture Agreement

(8) Rayonier should have known of the existence of the 1957 Joint Venture Agreement.

Exhibits:

- 1 1951 Joint Venture Agreement
- 1 1957 Joint Venture Agreement
- 3 Declaration of Trust
- 6 Registered Letter from Poulson to Rayonier dated June 1, 1954

Admitted Facts:

1, 15, 16, 28, 29, 35, 36, 37, 39 (R. 133-138)

This arises out of the duty on the part of Rayonier to inquire as to the extent of Jackson's authority.

(9) Polson had no knowledge of and did not consent to Jackson's actions in negotiating for or executing the Addendums and the Rayonier-Jackson contract.

Exhibits:

- 9 Addendum
- 10 Addendum
- 15 Jackson-Rayonier contract

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Admitted Facts:

48 (R. 140)

Transcript:

Page	Line	through	Page	Line
27	8		27	11
163	17		165	1
494	19		495	1
497	11		497	22
499	22		500	1
620	11		621	3

(10) The course of conduct and dealings of Polson and Jackson was not such as to give Jackson the apparent authority to contract for the cutting of timber on the Bumgarner Allotments.

See annotations to Item (1) above. In particular reference is made to :

Transcript:

Page	Line	through	Page	Line
64	25		65	7
280	7		280	12
285	5		285	7
620	11		620	14

(11) Polson did not in any manner consent to the Rayonier-Jackson contract, either before or after its execution. Said contract was unauthorized.

Exhibits:

- 6 Registered Letter from Polson to Rayonier dated June 1, 1954
- 15 Rayonier-Jackson contract

Transcript:

Page	Line	through	Page	Line
27	8		27	11
176	10		178	21
179	14		180	24

(12) L. J. Forrest has been employed by Rayonier at its Hoquiam, Washington office. From approximately 1950 to 1960 Mr. Forrest was manager of the Land Department. Since April, 1960, he has been a Vice-President of Rayonier, General Manager of Timber Operations, and the Chief Executive Officer of Rayonier in the State of Washington area. Mr. Wilton Vincent has been employed by Rayonier for approximately 20 years and for the last eight years has been the manager of the Land Department.

Admitted Fact:

19 (R. 135)

Transcript:

Page	Line	through	Page	Line
188	5		188	14
221	25		222	16

(13) Rayonier and in particular Messrs. Forrest and Vincent knew or should have known that Jackson did not have authority, apparent or otherwise, to contract for the cutting of timber on the Bumgarner Allotments, and should have inquired as to the extent of his authority.

See annotations to Items (1), (2) and (10) above.

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(14) Rayonier could not reasonably assume that if Polson had any objection to the Rayonier-Jackson contract he would so advise them at the time of its execution. Rayonier should have contacted Polson directly.

See annotations to Items (1), (2) and (10) above.

(15) Rayonier did not act in good faith and with probable cause if it relied on any representations of Jackson as to the extent of his authority, or upon his representations, if any, that Polson had consented to the Rayonier-Jackson contract.

See annotations to Items (1), (2) and (10) above.

In particular reference is made to Exhibit 6, admitted facts 35, 36, 37, (R. 137-138) and to the following portions of the transcript:

Page	Line	through	Page	Line
218	7		220	25
280	7		280	12
285	5		285	7
299	8		299	25
304	10		309	7

(16) Rayonier drafted the Rayonier-Jackson contract including a provision therein whereby Cleveland Jackson and Anna Jackson represented and warranted that they owned the one-half interest in the timber. Rayonier knew this was not true.

Exhibits:

15 Rayonier-Jackson contract

Admitted Facts:

36, 37, 44, 45, 46, and 47 (R. 137-139)

Transcript:

Page	Line	through	Page	Line
195	18		200	25
284	1		285	9

(17) Rayonier considered Jackson to be a valuable man to Rayonier primarily by reason of his strategic position of importance and influence in and with the Quinault Indian Tribe, and other Indians, and by reason of the benefits to be derived by appellant in having a close and favorable relationship with the individual representing the Tribe in its dealings with appellant, the United States Government, and others.

EXHIBIT:

- 33 Invoices covering payments by Rayonier to Cleveland Jackson.

Admitted Fact:

- 26 (R. 136).

Transcript:

Page	Line	through	Page	Line
229	8		229	14
238	7		246	13
249	25		251	1

(18) Rayonier, from 1950 through June of 1960, compensated Jackson, as an employee, with regular monthly payments in the approximate amount of \$400 to \$420 each.

Exhibit:

- 33 Invoices covering payments by Rayonier to Jackson.

A-17

Transcript:

See annotation to Item (17) and in particular transcript page 242, line 5 through page 243, line 6.

(19) Jackson submitted monthly statements showing a certain number of days cruising etc. Rayonier knew that in many instances these statements were not true and in many instances Jackson might not have performed any services during the month in question.

Exhibit:

33 Invoices and statements.

Transcript:

Page	Line	through	Page	Line
241	6		241	9
244	24		245	22

(20) Jackson embezzled over Two Hundred Thousand Dollars (\$200,000) from Polson.

Exhibits:

A-19-C Amended Creditors Claim

A-19-D Accounting of F. Arnold Polson, Surviving
Joint Adventurer

A-19-E Creditor's Claim

A-20-D Complaint

Transcript:

Page	Line	through	Page	Line
516	19		517	17
517	21		518	1
525	16		526	1

(21) Rayonier purposely did not contact Polson with

A-18

respect to logging the Bumgarner Allotments, both before and after the execution of the Rayonier-Jackson contract.

Exhibit:

29 Letter dated November 15, 1960 from Len Forrest to Anna Jackson.

Admitted Fact:

48 (R. 140).

Transcript:

Page	Line	through	Page	Line
26	23		27	19
280	7		280	20
294	10		296	14

(22). Rayonier did not, in fact, rely on any lack of protest or objection from Polson in (a) entering into the Rayonier-Jackson contract, or (b) in commencing or continuing logging operations on the Bumgarner Allotments.

See annotations to Items (1) and (20) above and in particular page 280, lines 7 through 11 and page 285, lines 5 through 7.

(23). Rayonier paid moneys to Anna Jackson, which they knew should be paid to Polson if they, in fact, regarded the Rayonier-Jackson contract a valid, binding contract with the Polson-Jackson Joint Venture.

Exhibits:

A-46 (a) through (g)

Admitted Facts:

1, 51 (R. 133, 140).

Transcript:

Page	Line	through	Page	Line
206	21		208	5
218	8		220	24
298	8		299	25

(24). Polson did not learn about the existence of the Addendums or the Jackson-Rayonier contract until sometime in the spring of 1961.

See annotations to Item (9) above.

(25). Polson did not learn about Anna Jackson receiving any payments from Rayonier for the cutting of timber on the Bumgarner Allotments until sometime after July 1, 1961.

See annotations to Item (9) above and in addition transcript page 515 lines 3 through 24.

(26). Polson did not know that Rayonier was contemplating logging the Bumgarner Allotments until sometime well after the logging operations had commenced, and Polson was not fully aware that Rayonier was actually logging the Bumgarner Allotments until sometime after the spring of 1961.

See annotations to Item (9) above and in addition transcript.

Page	Line	through	Page	Line
159	24		160	21
178	21		178	25
549	18		550	23

(27). Polson did not object or protest to Rayonier about the logging on the Bumgarner Allotments until after the cessation of logging in July of 1961 because he did

not have full knowledge of all the material facts until after that date. It was felt essential to first confirm the title in Polson and to complete the investigation of the facts, which investigations continued through the Grays Harbor County Probate Court on July 12, 1961, ordered Anna Jackson as Executrix of the Estate of Jackson, to convey and assign the legal and record title in the Bumgarner Allotments and certain other properties to Polson, by good and sufficient deed. Until such order of the court, the right and title of Polson was being challenged and contested by certain of the heirs of Jackson. Further, Polson felt the prior notice to Rayonier (Ex. 6) was sufficient, and throughout he relied on the advice of his attorneys.

Exhibits:

A-19-F Executrix Deed

A-19-G Order Confirming Joint Venture Status of Certain Properties and Directing Their Conveyance and Transfer to the Surviving Joint Venturer

A-19-L Petition for Order Confirming Joint Venture Status of Certain Assets and Authorizing Their Conveyance and Transfer to the Surviving Joint Venturer

Transcript:

Page	Line	through	Page	Line
159	24		167	23
174	23		180	20
510	13		511	4
515	3		515	23
521	17		523	2
536	10		538	13
557	19		558	17
572	22		574	20

A-21

(28). Under the facts and circumstances of this case, the delay, if any, by Polson in objecting or protesting to Rayonier or in disavowing the Rayonier-Jackson contract, was not unreasonable. Polson throughout relied upon the advice of his attorneys.

See annotations to Item (27) above.

(29). The delay, if any, by Polson after July 1, 1961, in notifying Rayonier that the Rayonier-Jackson contract was unauthorized did not prejudice Rayonier, and was not in bad faith nor intended to induce Rayonier to act to its prejudice.

Exhibit:

A-20-A Escrow Agreement

Admitted Fact:

49 (R. 140).

Transcript:

Page	Line	through	Page	Line
583	3		583	11

(30). Polson did not, at any time, intend to ratify the unauthorized acts of Jackson.

See annotations to Items (9) and (27) above.

(31). Polson did not exercise a continuing demand upon Anna Jackson, as Executrix of the Estate of Cleveland Jackson, that she pay over to him the funds paid by Rayonier to her.

Transcript:

Page	Line	through	Page	Line
517	18		517	24
564	23		566	18
580	11		584	2

(32). Polson has not exercised complete dominion over the funds that Rayonier paid to Anna Jackson, as Executrix of the Estate of Cleveland Jackson, pursuant to the Rayonier-Jackson contract. The escrow agreement with respect to said funds was made after the commencement of this lawsuit for the purpose of preserving said funds.

Exhibit:**A-20-A Escrow Agreement****Transcript:**

Page	Line	through	Page	Line
517	18		517	24
564	23		566	18
580	11		584	2

Specification 1.2.3. F. & C. No. 5, Ex. B (R. 342-3)

“There is no direct evidence in the case which I find credible, nor any inference from evidence which I consider reasonable, showing that Beaulieu any time had, was held out as having, or exercised any responsibility, authority, or agency for either Polson individually or for the Polson-Jackson joint venture concerning the sale of either land or timber owned by the joint venture. There is no evidence that he even so much as knew of a single proposed sale of joint venture land or timber other than as to the Bumgarner tract. He so testified, I believe him, and I do not consider any countervailing evidence has been offered.

“In my opinion, it is a fair inference from the evidence as a whole that Beaulieu’s duties and respon-

sibilities for the joint venture were largely, if not wholly, clerical and ministerial, and such as they were, his duties were primarily, if not exclusively, concerned with the acquisition of timber lands by the joint venture and not the sale of joint venture property.

"I find as a fact that such limited knowledge of the Bumgarner transaction as Beaulieu had, and in this respect I accept his statement of it and his views of what it amounted to at all times prior to the death of Jackson and for some time thereafter, indicated a tentative or proposed transaction. Beaulieu did not personally participate in that transaction, that is, in the negotiations or anything of that sort. He assumed, and under all of the circumstances I find he had a right to assume, that Jackson would not act in the matter in violation of his limited authority under the joint venture agreement which he, Beaulieu knew of from the beginning of his employment for the joint venture."

Transcript:

Page	Line	through	Page	Line
76	1		83	11
434	19		435	18
442	11		443	20
445	1		447	2
448	22		450	24
463	20		464	21
489	15		491	8
493	9		495	2
497	4		501	10
502	16		503	17

Specification 1.2.4 F. & C. No. 5, Ex. B (R. 343-4)

". . . I further find under all the circumstances that it was not his responsibility or duty to report what little he knew of the matter to Polson."

See citations under F. & C. No. 5, Ex. B (R. 343-4), Specification of Error 1.2.3.

Specification 1.2.5. F. & C. No. 5, Ex. B (R. 344)

“From these views it is my conclusion on the facts as found that the plaintiff is entitled to recover treble damages as prayed for based on R.C.W. 64.12.020 or, in the alternative, R.C.W. 64.02.030, or both.”

The record citations for this are covered under previous findings, this being a conclusion arising from the other Findings of Fact.

Specification 1.2.6. F. & C. No. 5, Ex. C (R. 349)

“Therefore, on that phase of the matter, I consider it so clearly indicated that further expense and delay in final disposition of this case by referral of the question to the State Supreme Court is not warranted. Therefore, I will hold and find in computing single damages, interest should be allowed.”

This is strictly a Conclusion of Law. No citation to the record is required.

Specification 1.2.7. F. & C. No. 5, Ex. C (R. 353)

“Certainly the resolution of the first of these two questions: Namely, whether recovery should be allowed for the full amount of the value of the timber stipulated at \$23,000, or for only one-half of that amount, is not entirely free from doubt.

“Any extended dissertation on the several facets of the question would take an extended statement. Viewing the situation as a whole, considering that recovery is for a wrongdoing, which the court has found and is fully satisfied was totally unjustified on the part of Rayonier, the terms of the joint venture agreement and the addenda thereto, and the practices of the parties make it very clear all Jackson was to have out of the joint venture business was a share in whatever profits might result from it. It was also made emphatically clear that Polson was to be fully reimbursed for funds expended by

him before any consideration be given to a distribution of profits to Jackson. I am satisfied on the whole issue that the recovery should be for the full amount of the single damages in the amount stipulated, and that will be the ruling of the court."

This is primarily a legal question, however, certain exhibits and certain portions of the testimony are particularly pertinent.

Exhibits:

- 1 1951 Joint Venture Agreement
- 1 1957 Joint Venture Agreement
- A-19-B Petition for Authorization to enter into Settlement
- A-19-C Amended Creditors Claim
- A-19-E Creditors Claim
- A-19-F Executrix Deed
- A-19-G Order Confirming Joint Venture Status of Certain Properties
- A-19-L Petition for Order Confirming Joint Venture Status of Certain Properties
- A-20-B Agreement
- A-20-D Complaint

Transcript:

Page	Line	through	Page	Line
504	11		505	8
517	25		521	7
523	3		525	2
525	16		526	1

Specification 1.2.8 F. & C. No.5, Ex. D (R. 361)

"Considering the latest memoranda and the entire record, I have no doubt whatever in my mind that recovery can and should be grounded in trespass.

However, if on appellate review it should be determined that the action does not lie in trespass, I find that it should and does lie in waste. Therefore, I now hold and find that recovery be allowed for trespass, which, of course, will not include recovery of attorneys' fees; and if it be found on appellate review that recovery in trespass is not appropriate, it is found and held that recovery be allowed for waste including allowance for attorneys' fees in the amount previously specified."

This is primarily a legal conclusion. To the extent facts are involved they have been covered with citations to the record in the argument portion of the brief.

Specification 1.3 That portion of Finding of Fact and Conclusion of Law No. 2 (R. 334, 335) as follows:

"It is the finding of the court that 'Fact Not to Be Contested' No. 8 is hereby modified by the caveat stated by the plaintiff in connection therewith. It is the specific finding of this court that Mr. Libby did not have authority to authorize a contract without procuring the approval of Polson, which approval was not obtained." Together with that portion of Finding of Fact and Conclusion of Law No. 5 that is lines 5-12, p. 10, Ex. C. (R. 357).

Exhibits:

- 25 Letter dated March 19, 1954
- 35 Affidavit of John W. Libby

Transcript:

Page	Line	through	Page	Line
209	13		210	3
212	3		212	25
404	11		404	14
409	25		410	5

No. 21121

IN THE
United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED,
Appellant,

v.

F. ARNOLD POLSON,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

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HONORABLE GEORGE H. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

STATEMENT OF FACTS

The appellee, in his Statement of Facts and throughout his brief, has erroneously or inaccurately stated as facts several items that must be corrected. The more important of these are as follows:

a) *The Polson-Jackson Joint Venture* (Appellee's Brief, p. 2; Appellant's Brief, p. 4.)

The statement that Jackson had not entered into any sales of land or timber or logging contracts with respect to Joint Venture property outside of the Rayonier-Jackson contract is not completely accurate. Jackson entered into a contract with Aloha Lumber Co. in 1956 with respect to logging an allotment, the timber on which had apparently been cut in trespass. (Def. Ex. A-18; Tr. 571-2) Also, Jackson executed an Easement Deed to the Forest Service, United States Department of Agriculture in 1960.

(Def. Ex. A-49; Tr. 569-70) This same error is repeated twice on page 23 and again on page 26 of Appellee's Brief.

b) *Nina Bumgarner* (Appellee's Brief, p. 3; Appellant's Brief, p. 7.)

The assertion that the contracts were merely to accommodate Mrs. Bumgarner was based upon Ex. 68 and 87, which are letters from the Bureau of Indian Affairs, on the testimony of John W. Libby of the Bureau of Indian Affairs (Tr. 373), on the testimony of Polson's employee and lawyer, Frank D. Beaulieu (Tr. 450, 464), as well as the testimony of L. J. Forrest and Wilton L. Vincent. There is no evidence to the contrary.

c) *Negotiations with Bureau of Indian Affairs* (Appellee's Brief, p. 5; Appellant's Brief, p. 10).

The Bureau of Indian Affairs was aware of at least one other transaction as Richard Bush obtained from the Bureau information concerning the Timber Cutting Contract dated June 14, 1956, between Jackson and Aloha Lumber Co. (Tr. 571-2)

d) *Events Prior to the Rayonier-Jackson Contract* (Appellee's Brief, p. 6; Appellant's Brief, p. 12.)

On page 7, appellee states that the 1951 Joint Venture Agreement provides "all proceeds were to be paid to Polson." This statement is erroneous as paragraph IV of the 1951 Agreement (Pl. Ex. 1) provides that "all proceeds thereof *as received* shall be paid to Polson." (Emphasis added) The Agreement does not state that the proceeds were to be received by Polson, and not even Polson contended at trial that it should be so interpreted. (Tr. 64) In fact, Jackson was the logical person to receive any proceeds from third parties as he was the managing partner and title to the real property was in his name, as was the Joint Venture bank account.

Correction of this inaccuracy is very important as ap-

pellee devotes entire paragraph G (Br. pp. 7-8) to this assertion, as well as a substantial portion of pages 28 and 30, most of page 43, and part of page 18.

e) *Investigation by Polson of Joint Venture Properties* (Appellee's Brief, p. 7; Appellant's Brief, p. 18.)

The two citations to the transcript (pp. 510 and 508) are to the testimony of John Kirkwood, the attorney for Anna Jackson, and do not support the statement that Polson did not acquire all material facts until July 1, 1961.

It is clear that the facts outlined in Appellant's Brief at pp. 18-21 were known to Polson and his agents by the dates indicated. Any information obtained by Attorney Bush was promptly reported to Polson. (Tr. 161) At no point in Appellee's Brief has Polson set forth any fact material to this lawsuit, of which he did not have full knowledge on or before April 15, 1961.

f) *Creditor's Claim and Demands Upon Jackson Estate* (Appellee's Brief, p. 8; Appellant's Brief, p. 22)

Mr. Bush, in his deposition of September 15, 1965, which was less than two months prior to the trial, did use the words "standing demand" when he testified as follows:

"Well, from the time that we first knew of the amount of money that had been paid to Mrs. Jackson, there were, I'd say—there was a *standing demand*, really, for the payment of that money to us." (Tr. 566) (Emphasis added)

Mr. Bush's testimony at his deposition is quoted in full at pages 56-58 of Appellant's Brief.

The original Creditor's Claim (Def. Ex. A-19-E) did include a claim for the proceeds from logging on the Bumgarner Allotments. The reference in Appellee's Brief to page 582 of the transcript is to an unresponsive com-

ment by Mr. Bush in answer to a question by the court and concerned the Amended Creditor's Claim (Def. Ex. A-19-C), not the original Creditor's Claim (Ex. A-19-E).

REPLY TO APPELLEE'S BRIEF

PART I

Jackson Had Inherent or Apparent Authority to Execute the Rayonier-Jackson Contract and the Addendums (Appellee's Brief, p. 16; Appellant's Brief, p. 34)

In his discussion of authority, appellee has confused the doctrine of apparent authority of an agent with the statutory authority of a partner under Section 9 of the Uniform Partnership Act and has ignored the applicable sections of the Act, which Act is controlling with respect to the agency issues in this case. In addition, throughout Part I of his brief, particularly at pages 22-24, appellee argues that the Rayonier-Jackson Contract was "unique," and not "usual," ignoring the fact that contracting for logging of timber was one of the stated purposes of the Joint Venture (Pl. Ex. 1) and that of the 102 parcels of land that were acquired by the Joint Venture, 32 were subject to timber cutting contracts with either Rayonier or Aloha Lumber Company at the time they were acquired, which contracts were substantially similar in effect to the Rayonier-Jackson Contract.

Appellee places great stress upon what he contends was Rayonier's duty to inquire with respect to Jackson's authority. However, he ignores the knowledge that Rayonier and Indian Service personnel had acquired with respect to Jackson's role as managing partner, and further ignores the fact that Polson's employee, attorney Beaulieu, telephoned Forrest on the day after the contract was signed and inquired concerning the contract and logging plans. Would anyone be expected to make a further inquiry after receiving such a telephone call?

In Section 5 at page 25, appellee has misinterpreted appellant's contention that the Joint Venture was bound by Jackson's representations concerning Polson's knowledge and approval. The representations by Jackson were not statements concerning his authority, but were representations by him with respect to partnership affairs, such as whether he and his partner Polson were willing to contract to have the timber logged and on what terms and conditions. As such, the representations were within the scope of Section 11 of the Uniform Partnership Act, as quoted in full at page 43 of Appellant's Brief.

PART II

Regardless of Jackson's Authority Polson Ratified the Rayonier-Jackson Contract by His Conduct. (Appellee's Brief, p. 26; Appellant's Brief, p. 45)

A. Ratification by Silence (Appellee's Brief, p. 26; Appellant's Brief, p. 48)

By way of introduction, appellee states at page 26 that, "Basically, the rule that ratification *can* be inferred from silence is designed to protect innocent parties." The rule is to the contrary.¹ Appellee cites no authority for his statement but nevertheless premises his argument on it and attempts thereby to shift attention from his unexplainable conduct to an examination of Rayonier's conduct. For example, appellee implies at page 28 that Rayonier logged the Bumgarner Allotments because Jackson was an extremely valuable man to them as Chief of the Quinault Tribe (apparently forgetting that Jackson died several months prior to commencement of logging).

1. Restatement of Agency, Second.

"§ 92. Events Not Required for and Not Preventing Ratification:

"An affirmance by the principal of a transaction with a third person is not prevented from resulting in ratification by the fact:

* * *

"(f) that the agent or the other party knew the agent to be unauthorized;"

Also appellee criticizes Rayonier at page 30 for participating in or furthering an alleged deception because the Rayonier-Jackson Contract provided that proceeds would be paid to Jackson, repeating the error with respect to who was to receive proceeds discussed above at page 2.

Appellee places considerable weight on the case of *Myers v. Cook*, 87 W.Va. 265, 104 S.E. 593 (1920). The case, as quoted in *Mechem Outlines Agency, Fourth Edition*, page 145, is quoted and discussed at pages 30 and 31 of his brief. Appellee's quotations from the case and from *Mechem* are very misleading in their application to the present case. The court in *Myers v. Cook* stated in the paragraph that immediately preceded the statement quoted in *Mechem*:

“There are a few decisions in which it has been broadly stated that mere unaided silence after notice is enough to prove ratification (citing cases). But in all of them additional elements are found. Moreover, the relation of principal and agent existed, and the unauthorized acts were acts in excess of authority, not the acts of strangers having no authority at all. *The distinction between the acts of agents and strangers, in this connection, is highly important . . . Where there is no relation of agency, and the act was done by a mere stranger or volunteer, and the circumstances impose no duty to speak, mere silence does not prove ratification. (Citing cases) Such is this case.*” (Emphasis added) *Myers v. Cook*, 104 S.E. at 595.

In addition, *Mechem* introduced *Myers v. Cook* with the statement that:

“A few [cases] hold that there is in general no duty to speak and find no special factors creating such a duty.” *Mechem Outlines Agency*, p. 145

and followed the discussion of the case with the observation that:

“By and large, juries have found duty, and so ratification, where one who ‘should in good conscience speak’ fails to do so, and appellate courts have affirmed the finding.” *Mechem Outlines Agency*, p. 146.

Furthermore, appellee concedes at page 32 of his brief that “If Rayonier had contacted Polson, and at that point he did not voice any dissent or objection, a far different situation would have existed.” But appellee ignores the following:

a. Beaulieu, a lawyer and employee of Polson and the Joint Venture, telephoned Forrest of Rayonier and inquired whether the Rayonier-Jackson Contract would be recorded and when logging would commence.

b. Forrest provided the copy of the Addendum that was delivered by James Jackson to Beaulieu and in turn to Polson with Forrest’s note of transmittal still attached. (Def. Ex. A-39-A, -C and -D)

c. Richard K. Bush, Polson’s attorney, with full knowledge of all material facts, wrote letters (Def. Ex. A-57 and A-56) to Forrest concerning Cleveland Jackson and his affairs and made no mention of any irregularity concerning the Rayonier-Jackson contract or the logging on the Bumgarner Allotments by Rayonier. At approximately the same time Bush conversed with L. F. Marion, one of Rayonier’s attorneys, concerning a possible meeting with Forrest to discuss Cleveland Jackson and his affairs and again made no mention of Bumgarner Allotments.

B. Ratification by Conduct (Appellee’s Brief, p. 33; Appellant’s Brief, p. 55)

1. The Creditor’s Claim (p. 33)

As pointed out at page 3 hereof, appellee is in error in his citation to the comment of Mr. Bush as supporting his contention that the original Creditor’s Claim (Def.

Ex. A-19-E) did not include a claim for the proceeds from the Bumgarner Allotments, as Bush referred to the Amended Creditor's Claim. (Def. A-19-C)²

Appellant submits that paragraph "(d)" of the original Creditor's Claim (Def. Ex. A-19-E), together with the testimony of Polson, particularly that in response to questioning by the court (Tr. 126), establish that the Creditor's Claim included the proceeds from the logging by Rayonier on the Bumgarner Allotments. By filing the claim with the Jackson Estate, Polson thereby ratified the Rayonier-Jackson Contract.

2. The Standing Demand (p. 34)

The testimony of Polson's attorney, Richard Bush, at his deposition less than two months prior to trial, is clear and unequivocal. This testimony is quoted at pp. 56-58, Appellant's Brief. In the words of Mr. Bush:

"A. Well, from the time that we first knew of the amount of money that had been paid [by Rayonier] to Mrs. Jackson, there were, I'd say—there was a standing demand, really, for the payment of that money to us." (Tr. 566)

3. The Lawsuit Against the Jackson Estate (p. 37)

Appellee contends that the Complaint (Def. Ex. A-20-D) was drawn so that the contract proceeds were not included. Even a casual examination of the first three causes of action of the Complaint discloses that the proceeds from logging by Rayonier on the Bumgarner Allotments were prominently involved in each cause of action.³

Appellee attempts to avoid this difficulty by suggest-

2. In addition, attention is directed to the question by the court at page 580, Bush's answer at pages 581-83 and to the colloquy between court and counsel that followed at pp. 587-594. The gist of this colloquy is quoted in Appendix A to this brief.

3. See pages 58-9, Appellant's Brief, for a more complete discussion of the lawsuit.

ing that paragraph 1 of the prayer for relief was limited to real property. There is nothing in that paragraph from which such a limitation can be inferred. Furthermore, whether or not the contract proceeds were specifically included in the prayer of the Complaint is immaterial, as paragraph 4 of the prayer requests, in part, “such other and further relief as to the court shall appear proper.” With such a general prayer for relief, the Grays Harbor County Superior Court had authority to enter any judgment consistent with the factual allegations of the Complaint, which allegations included three alternative causes of action involving the contract proceeds. As Professor Meisenholder stated in 32 Wash. Law Rev. 234 (1957):

“Most complaints are now drafted to include a general prayer for relief. Such prayers will justify a judgment (other than a default judgment) in accordance with facts alleged in the complaint and the evidence.”⁴

Appellee attempts to avoid the problem by urging at page 37 that the unresponsive narrative comment by his co-counsel is controlling, stating that the “only clear statement on this point in the record was by Mr. Bush, the ‘author’ of the complaint and the accounting.” However, appellee ignores the following:

a. The testimony of Polson that he considered the \$20,000 in contract proceeds to be a Joint Venture asset and that he made the allegations in the Complaint because he was entitled to have the funds paid to him pursuant to the 1951 Joint Venture Agreement; (Tr. 135-6)

b. The testimony, comments by the court, and the colloquy between counsel and the court that is set forth at pages 587 through 594 of the transcript, the relevant

4. Citing *Loutzenhiser v. Peck*, 89 Wash. 435, 154 Pac. 814 (1916) and *Salt v. Anderson*, 107 Wash. 149, 180 Pac. 873 (1919).

portions of which have been printed as Appendix A to this brief.

After examining the question by the court at page 580, Bush's response at pages 581-83, and the question, objection by appellant and the colloquy between court and counsel, as set forth in Appendix A, it is obvious that appellee erred in categorizing Bush's comment as a "clear statement" and in suggesting that the statement is controlling as "The appellant did not pursue it further. . . ." (Appellee's Brief, p. 37)

4. *Settlement of the Lawsuit* (p. 38)

In his discussion of the settlement and escrow agreement, as in his discussion of the creditor's claim and the lawsuit, appellee has not met the issues raised. The appellee, in the final paragraph on page 40, attempts to avoid the problem by suggesting that since the suit, settlement and escrow agreement took place after commencement of this lawsuit, the "subsequent actions to preserve the funds were obviously not a ratification of said contract." Such an assertion ignores the general rule suggested by Section 97 of the Restatement of Agency, Second, which is quoted in full at page 59, Appellant's Brief.

PART III

Polson Is Estopped to Deny the Validity and Enforceability of the Rayonier-Jackson Contract (Appellee's Brief, p. 40; Appellant's Brief, p. 63)

1. *Full Knowledge of All Material Facts* (pp. 40-42)

Appellee places great reliance upon the portion of Finding of Fact No. 4 (R. 335) that Polson "did not have full knowledge of all material facts regarding the [logging] contract until July of 1961." An examination of the testimony cited by the appellee at page A-1 of the Appendix to his brief in support of this portion of the finding

(which Finding was Specification of Error 1.1) discloses no evidence to support this finding. To the contrary, the testimony of Polson and Bush, his attorney, establishes conclusively that Polson had full knowledge of all material facts concerning the logging contract not later than April 15, 1961. Any information obtained by Bush was promptly reported to Polson. (Tr. 161) The dates by which Polson had knowledge of each fact are outlined at pages 18-21 and 48-50, Appellant's Brief, and appellee cites no material fact of which he did not have full knowledge on or before April 15, 1961.⁵

2. Intent to Mislead (p. 42)

The Washington rule with respect to the elements of estoppel by silence is apparently unclear. To be contrasted with the 1916 Washington case quoted by the appellee at page 41 is the statement by the court in *Harms v. O'Connell Lumber Co.*, 181 Wash. 696, 700-1, 44 P.2d 785, 787 (1935), that:

"If one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent. This rule of estoppel is applicable where the owner of property stands by and knowingly permits another to expend money upon it by making improvements, erecting buildings, and the like.

"In 2 Pomeroy's Equity Jurisprudence, §818, under the heading of Acquiescence as an Estoppel to Rights of Property or of Contract, it was said:

"Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a

5. In fact, the Washington court has stated that either actual or constructive knowledge is sufficient for estoppel. See *Huff v. Northern Pac. Ry. Co.*, 38 Wn.2d 103, 114, 228 P.2d 121 (1951). Polson had constructive knowledge of all the material facts well before April 15, 1961. For example, information with respect to the Rayonier-Jackson Contract was included on the Schedules that Beaulieu prepared in August, 1960. See Def. Exs. A-1 and A-14.

party from asserting legal title and rights of property, real or personal, or rights of contract. The requisites of such estoppel have been described. A fraudulent intention to deceive or mislead is not essential. All instances of this class, in equity, rest upon the principle: If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent.’”

See also *Huff v. Northern Pac. Ry. Co.*, 38 Wn.2d 103, 114-115, 228 P.2d 121 (1951), which sets forth the general rule in Washington with respect to estoppel and cites with approval the *Harms* case.

In addition, the *Blanck* case cited by appellee at page 41 is inapplicable because it rests upon “mere silence, without positive acts,” ignoring the following: (a) Beaulieu’s telephone call to Forrest inquiring with respect to the Rayonier-Jackson Contract and when logging would commence; and (b) Bush’s letters to Forrest (Def. Ex. A-56 and A-57) and his telephone call to L. F. Marion with respect to Cleveland Jackson and his affairs.

3. *Polson’s Silence Did Mislead and Prejudice Rayonier* (p. 42)

Appellee argues at pages 42-3 that obviously Rayonier was not relying upon the contract being a valid contract with the Joint Venture. But, query, with whom did Rayonier think it was contracting when it negotiated with the managing partner and discussed the completed contract with Polson’s lawyer—employee Frank Beaulieu? If Rayonier was not relying on a valid contract, why did it expend considerable sums to build roads? Why did it log the property? And why did it make over \$22,000 in payments to the Bureau of Indian Affairs and the Cleveland Jackson Estate pursuant to the contract? Appellee at page 3 suggests ulterior motives on the part of Rayonier and

comments at page 28 that Jackson was a valuable man to Rayonier. However, Jackson had been dead for two months when the logging commenced. If, as appellee insinuates, Rayonier contracted with Jackson to keep his "valuable" friendship, then why did it commence logging and perform under the contract after his death? Obviously for the reason that it believed it was acting under a valid contract.

Appellee suggests that Rayonier was not prejudiced because of anything that occurred after July 1, 1961. Assuming for purpose of argument that Polson did not have full knowledge until July 1, 1961, appellee nevertheless ignores the fact that substantial payments were made after July 1, 1961, by Rayonier to the Bureau of Indian Affairs for administrative services pursuant to the Addendums, and that over \$12,000 in payments were made by Rayonier after that date to Anna Jackson, as Executrix of the Jackson Estate, pursuant to the Rayonier-Jackson contract.

Rayonier received no setoff or credit for the payments to the Bureau of Indian Affairs. With respect to the payments to the Jackson Estate, Polson suggests that appellant has not been prejudiced as the court allowed a set-off. Such an argument ignores the following: (1) Rayonier obtained the right of setoff only after a contested court hearing and over the vigorous and prolonged opposition of Polson's attorneys; (2) Rayonier lost the use for over five years of the payments it had made and the proceeds earned no interest for the three years they were in Polson's escrow.⁶

At page 43 appellee again misstates the Joint Venture Agreement provision as to who was to receive sale

6. Consequently, although Rayonier was allowed a setoff, it had only \$20,000 to set off against claimed damages that increased over the five years from \$23,000 to \$30,000 (\$23,000 actual damages together with the five years' interest at 6% per annum that was awarded by the court).

proceeds. In addition, appellee cites no authority, business or legal, for the statement that the payments, in the ordinary course of business, would be made to Polson, not the Executrix of Jackson's Estate. Polson and his attorney were fully aware that the payments were being made by Rayonier to Jackson's Executrix and at no time requested that Rayonier send them to Polson instead.

PART IV

The Cutting of Timber By Rayonier Was Not a Trespass or Waste (Appellee's Brief, p. 44; Appellant's Brief, p. 67)

Appellee, in his heading to Part IV, page 44, states that Rayonier violated either the treble damage trespass statute or, in the alternative, the treble damage waste statute. Appellee does not discuss how Rayonier could have violated the treble damage waste statute and fails to respond to that portion of appellant's brief (p. 78) that discussed the question.

Further, in his discussion of waste in Part IV, appellee has apparently confused three separate concepts of waste:

(a) the statutory treble damage action for waste under R.C.W. 64.12.020;

(b) the cause of action in those states that have either enacted or adopted as part of their common law the English Statute of Westminster II or its equivalent. See Vol. 2, American Law of Property, § 6.15, p. 64;

(c) a common law action that he claims exists in Washington allowing actions for waste between cotenants in fee.

The statutory treble damage action under R.C.W. 64.12.020 is discussed in Appellant's Brief at page 78. From that discussion, it is clear that Rayonier did not violate the waste statute by its logging. Appellee must concede that the waste statute would be inapplicable to any logging by Nina Bumgarner.

The Statute of Westminster II has not been enacted in Washington and was not included within the scope of the waste statute that was adopted by the Washington legislature. The Washington court has not adopted the statute or its equivalent. There is neither statutory nor common law basis in Washington for an action in waste based upon this Statute. See *McLeod v. Ellis*, 2 Wash. 117, 26 Pac. 76 (1891).

Therefore, it must be the third concept of waste upon which appellee bases his argument that if Nina Bumgarner had logged without the consent of the Joint Venture, she would have committed waste. Appellee argues that what Nina Bumgarner could not legally do, she could not legally license Rayonier to do. Accordingly, argues appellee, Rayonier acted "without lawful authority" and committed a trespass.

Even if it is assumed for purpose of argument that the Rayonier-Jackson Contract was invalid and that Joint Venture consent was required, we point out that such consent was given. We also point out that it is not unlawful in Washington for a cotenant in fee to cut mature timber; that Nina Bumgarner could and did legally license Rayonier to cut the timber on the allotments; that Rayonier did not violate the trespass statute when it cut the timber; and that whether or not the Joint Venture consented to the Rayonier-Bumgarner contracts is immaterial.

A. Joint Venture Consent Was Given

As discussed above, appellee contends that Nina Bumgarner and her licensee-purchaser Rayonier could not lawfully log without the consent of the Joint Venture. Appellee incorrectly assumes that consent was not given, and his assumption is based on the premise that the only way by which the Joint Venture could consent was by a valid contract between Rayonier and the Joint Venture. Appellee cites no authority for this premise.

Whether or not Joint Venture consent was required, such consent was, in fact, given to the Rayonier-Bumgarner Contracts and to the logging by Rayonier as the licensee-purchaser from Nina Bumgarner.⁷ This consent by the Joint Venture is demonstrated by the following acts in writing whereby it manifested its consent to the Superintendent, Western Washington Indian Agency, who was acting on behalf of Nina Bumgarner:

a. Jackson's letter of May 15, 1959 (Ex. 93) agreeing to have Rayonier log one of the Bumgarner Allotments, which letter was in response to a letter dated May 12, 1959, from the Superintendent. (Ex. 92)

b. Jackson's letter of June 18, 1959, to the Western Washington Indian Agency (Ex. 95) rejecting a proposed partition and agreeing to have Rayonier log.

c. Beaulieu's letter of June 18, 1959, to the Western Washington Indian Agency (Ex. 96) suggesting that Rayonier be allowed to log the allotments.

d. Jackson's affirmative response to a letter of June 24, 1959, from the Superintendent (Ex. 97) (a copy of which was sent to Beaulieu), whereby Jackson executed the two Addendums (Pl. Ex. 9 and 10) and forwarded them to the Western Washington Indian Agency.

e. The execution by Jackson of the two Addendums. (In this connection, it should be pointed out that appellee failed to respond to that portion of Appellant's Brief (pp. 36-45) that discussed Jackson's authority vis-a-vis the Indian Agency and the validity and effectiveness of the Addendums.)

As the Joint Venture did consent to the Rayonier-Bumgarner Contracts, appellant, as the purchaser under said

7. Appellee erroneously substitutes Polson for the Joint Venture as Nina Bumgarner's cotenant throughout Part IV of his brief. The Joint Venture was Nina Bumgarner's cotenant—not Polson.

contracts, did not and could not, as a matter of law, commit a trespass.

B. Joint Venture Consent Was Not Required

As discussed above, the gist of appellee's argument is that Nina Bumgarner could not have legally cut the timber on the two allotments without Polson's consent. Appellee must concede that Nina Bumgarner would not have been subjected to a treble damage claim under the trespass statute (R.C.W. 64.12.030), or the waste statute (R.C.W. 64.12.020) if she personally had logged without his consent as neither statute is applicable to a tenant-in-common in fee. The Joint Venture's remedy for such a cutting would be an accounting. However, appellee argues that although Nina Bumgarner herself could cut and only account, nevertheless it would be waste and that anyone to whom she sold the timber or licensed or hired to cut the timber would not be entitled to cut and account, but must pay treble damages.

The appellee cites several cases from other states (pp. 48-49) where the courts have stated that the cutting of timber by a cotenant is waste. However, as he concedes, in most states the remedy is an accounting, not tort damages. An example of this is *Clark v. Whitfield*, 213 Ala. 441, 105 So. 200 (1925), which is cited by appellee at page 48, footnote 1, for the proposition that cutting by a cotenant is waste. In that case the court quoted a rule that previously had been adopted in several cited Alabama cases, as follows:

“If a tenant in common receives more than his share of the profits, by an excessive use of the property, as by wearing out the land, or by an improper use of it, as by cutting down the timber and selling it, he cannot be treated as a tort-feasor, but the remedy of the cotenant is by an action of account, or a bill in equity for an account.’” 105 So. at 205

Appellant is not urging a unique theory in suggesting that Joint Venture consent was not required and that Rayonier did not commit a trespass when it logged the two allotments. This is precisely the conclusion that the Rhode Island court reached in the *Buchanan* case⁸ that was discussed by appellant at pages 71-77.

At page 50 appellee attempts to distinguish the cases cited by appellant on the basis that the timber was treated by the court as personalty in each case, as contrasted to Washington, where standing timber is realty. Although the *Buchanan* case cited by appellant treated the timber as a part of the revenue of the cotenancy, the *Kirby Lumber* case⁹ did not, and in addition, in each of the states involved, including Rhode Island, standing timber, absent a contract of sale, is considered realty, just as it is in Washington.¹⁰ Further, in Washington the rule with respect to standing timber conveyed distinct from the land is unclear. To be contrasted with *Dowgialla v. Knevage*, 48 Wn.2d 326, 294 P.2d 393 (1956), which is cited by appellee at page 50, is the more recent case of *Leuthold v. Davis*, 56 Wn.2d 710, 355 P.2d 6 (1960), where the court stated:

“Where, as here, title to the timber is conveyed or reserved distinct from the land, the timber becomes personal property separate from the land.”
355 P.2d at p. 8.

There is neither statutory nor common law basis in Washington for an action of waste between cotenants and

8. *Buchanan v. Jencks*, 38 R.I. 443, 96 Atl. 307 (1916).

9. *Kirby Lumber Co. v. Temple Lumber Co.*, 125 Texas 294, 83 S.W. 2d 638 (1935).

10. *Ozan Lumber Co. v. Price*, 219 Ark. 709, 244 S.W.2d 486 (1952); *Carnahan v. Terrall Bros.*, 137 Ark. 407, 209 S.W. 64 (1919); *Fish v. Capwell*, 18 R.I. 667, 29 A. 840 (Timber is real property until it is subject to a contract of conveyance); *Davis v. Conn*, (Tex. Cir. App.), 161 S.W. 39 (1913) (Same).

neither Nina Bumgarner nor Rayonier committed waste or trespass. In fact, there are several recent decisions involving adverse possession between cotenants where the Washington court has stated the general rule that "the entry of a cotenant on the common property, even if he takes the rents, cultivates the lands, or cuts the wood and timber without accounting or paying for any share of it, will not ordinarily be considered as adverse to his cotenants and an ouster of them." *McGill v. Shugarts*, 58 Wn.2d 203, 204, 361 P.2d 645 (1960).¹¹

PART V

Only Single Damages (if any) Should Have Been Awarded, (Appellee's Brief, p. 55; Appellant's Brief, p. 80)

Considering all the circumstances of this case, particularly the conduct of Polson, the activities of Jackson as the managing partner, and the fact that Polson's employee-lawyer Beaulieu contacted Rayonier concerning the contract the day after it was executed, the award of treble damages to Polson was not only clearly erroneous, but is a miscarriage of justice.

Treble damages are not appropriate under R.C.W. 64.12.030 where the owner knows of the logging and re-

11. See also Vol. II, American Law of Property, § 6.15, pp. 64-66, where Dean Russell Niles and Professor William Walsh conclude: "The English courts have held that the same standard [for waste] cannot be applied to life tenants or tenants for years as to co-owners in fee, since each co-owner has the right to use and enjoy the common property in any reasonable way, so long as he does not exclude his co-tenants from a like use and enjoyment. Since a co-tenant of an estate in fee may make such reasonable use of the property as any owner of a fee simple estate, he may cut trees which are mature and fit for cutting. . . . In a considerable number of American cases dealing with mines, quarries, oil lands, and timber, there is, however, hopeless confusion. . . . It is submitted that the position of the English cases is entirely sound, and that the reasonable use of the property by a co-owner in fee, in order to receive the fullest benefits therefrom, cannot rightly be treated as waste under the statutes which have re-enacted the Statute of Westminster II." (Footnotes omitted)

mains silent, for one of three purposes of the statute is abused in such a case. If damages were to be awarded, the trial court should have mitigated the damages under R.C.W. 64.12.040 or held Polson to be estopped by his conduct to recover more than single damages.

PART VI

Polson's Recovery Is Limited By Reason of Jackson's Interest in the Joint Venture, (Appellee's Brief, p. 57; Appellant's Brief, p. 81)

In his discussion appellee has completely confused Jackson's right to a one-half interest in any profits with Polson's right to be repaid by Jackson from these profits. From the 1961 Joint Venture Tax Return (Def. Ex. A-45) that was filed by Polson in early 1962, it is clear that Polson himself considered that Jackson had a one-half interest in the profits. This same approach was taken by Polson in the accounting that he filed in the Jackson Estate (Def. Ex. A-19-D). Jackson's misappropriations were known by Polson when he executed the Tax Return and Accounting, and in each of them he treated Jackson as having a one-half interest in the profit. As outlined in Appellant's Brief, at page 84, there was a substantial profit from the Bumgarner Allotments and Jackson had a one-half interest in it.

CONCLUSION

The judgment of the District Court should be reversed.

Respectfully submitted,

HOLMAN, MARION, PERKINS, COIE & STONE
DOUGLAS P. BEICHLE
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Attorneys for Appellant

APPENDIX A

At pages 587-89 the following occurred:

Question (By Mr. Howard to Witness Bush)

"Now, having reviewed those paragraphs [referring to paragraph 11, page 4, paragraph 4, page 6, and paragraph 4, page 8, of the Complaint, Def. Ex. A-20-D] would you please explain for the court why you can make the statement that this suit did not constitute a claim for those funds?

"MR. BEIGHLE: I object to that question. I think the complaint speaks for itself.

* * *

"MR. HOWARD: Your Honor, I am willing to have him refer there specifically to the complaint and explain the basis for his action or his statement in light of the statements in the complaint.

"MR. BEIGHLE: The court ought to interpret the complaint.

"THE COURT: Ultimately that will be my duty to do so.

"Is there any area of fact as distinguished from interpretation?

"MR. HOWARD: I believe there is, your Honor.

"THE COURT: If there be some area of fact that bears upon the interpretation of the paragraphs of the complaint in question, you may bring that out.

* * *

"MR. HOWARD: Perhaps I can clarify this for the Court.

It will be our contention that there is no mention, and the moneys are not included in any manner in the prayer for relief, and that is determined by examining and explaining the accounting, which is referred to in the paragraph for relief."

Then at pages 589-93, the Judge commented as follows:

"THE COURT: Well, now, if this is something

which can be derived from the complaint itself, that is a matter of argument.

"If there is some fact matter pertaining to it, this is another question. That is why I said if there is some area of fact as distinguished from argument or opinion or individual interpretation or the like, it is a rather odd situation presented. . . . (Tr. 589)

"I think there must be some explanation of this situation that goes beyond merely the interpretation of the document.

"But if there is not, and it cannot be demonstrated from the document itself, of course, there is nothing—no occasion to have Mr. Bush testify about it.

"One of the reasons that I am hesitant about having Mr. Bush testify about it is because of the fact that we have made it plain that he should not argue any matters as to which he testifies, and I don't want to go into the guise of having a witness presenting an argument concerning the subject matter. But that is why I am trying to emphasize that.

"If there is some element of fact relating to this interpretation of the document that does not appear upon the face of the document itself, I will permit to that extent, whatever this witness may say about it.

"If you would like to have a little conference between yourselves to determine what your position as to that is, I am perfectly willing to take a recess at this time." (Tr. 591-2)

After recess, Mr. Howard advised the court as follows:

"MR HOWARD: My apologies to the court for the problems that arose recently. I was involved with a problem that had a complex nature of accounting, and I think I, having reviewed it, feel it can be presented in the documents and will not press this point any further.

"THE COURT: Very well." (Tr. 593)

No. 21139 ✓

United States
COURT OF APPEALS
for the Ninth Circuit

RELiance NATIONAL LIFE INSURANCE
COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

*On Appeal from the United States District Court
for the District of Oregon*

BRIEF FOR APPELLANT

FILED

SEP 12 1966

WM. B. LUCK, CLERK

CAKE, JAUREGUY, HARDY, BUTTLER & McEWEN,
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NOV 4 1966

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United States
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BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered May 8, 1966. The action was commenced by appellee Margaret Hackelman against appellant Reliance National Life Insurance Company in the United States District Court for the District of Oregon. Appellee's complaint asked \$11,750.00 damages for fraud and deceit, and appellant denied any liability. Appellee is a resident of the state of

Oregon; appellant is a corporation organized and existing under the laws of the state of Utah. Jurisdiction is based upon 28 USC 1332(a)(1).

STATEMENT OF THE CASE

This is an action brought by appellee Margaret Hackelman for \$1,750.00 general damages and \$10,000.00 punitive damages for fraud and deceit. Appellee alleged that she bought a life insurance contract from appellant Reliance National Life Insurance Company because of the false and fraudulent representations of appellant's agent, William J. Burchfield, to the effect that:

1. Appellee would be purchasing a proprietary interest in appellant company,
2. Appellee would be "investing" in appellant company, and
3. Appellee would realize substantial income from this investment in the near future.

The lower court found the aforesaid "false representations" to have been made, and assessed general damages as prayed for by appellee less a credit for an annuity payment made by appellant to appellee. Punitive damages were not allowed.

In July, 1963, appellant's agent Burchfield called upon appellee at her home near Prineville, Oregon. At that time, appellee agreed to purchase two of appellee's policies (Def's. Exs. 12-13), one insuring her life and another the life of her granddaughter Twila Wilson. Ap-

appellee paid Burchfield a \$500.00 premium for those policies (Tr. 9). The policies were issued effective September 4, 1963 (Def's. Exs. 12, 13). In January, 1964, Burchfield again called on appellee and solicited from her an application for an additional policy and a premium of \$1,250.00 thereon (Tr. 11). This policy was issued effective January 21, 1964 (Def's. Ex. 14). The foregoing policies all provided for life insurance, dividends from earned surplus, accruing cash surrender values, and for a guaranteed annual annuity. Appellee received an annuity payment of \$288.35 on March 3, 1964 (Def's. Ex. 18). Sometime around July of 1964, agents of the Investors Insurance Company of Oregon called upon appellee, deprecated appellant's policies and advised appellee that their company's policies were better than appellant's (Tr. 53-4). Appellee thereafter ordered six policies from those agents (Tr. 55). made no further payments on her policies with appellant, and thereafter brought this action.

QUESTIONS PRESENTED

1. Whether there was any evidence of representations that appellee would have a proprietary interest in appellant company.
2. Whether the statements made by appellant's agent regarding an "investment" by appellee and regarding dividends to be received by appellee were in fact false representations.
3. Whether appellee was actually misled by appellant's agent as to the nature of her purchase.

SPECIFICATION OF ERRORS

1. The district court erred in failing to dismiss appellee's complaint.
2. The district court erred in finding that appellant's agent made false representations to appellee.
3. The district court erred in finding that appellee was misled by representations of appellant's agent.
4. The district court's findings of fact VII and VIII are clearly erroneous; no misrepresentation was made.
5. The district court erred in concluding that appellee had sustained the burden of proof.
6. The district court erred in denying appellant's motion for a new trial and for amendment of the findings of fact, conclusions of law and judgment.

SUMMARY OF ARGUMENT

Appellant's agent told appellee she would receive dividends. The contract delivered provides for dividends, and there is no evidence that she would not have received the same as provided in the contract had she maintained the contract.

The only evidence concerning representations by appellant's agent with regard to the nature of appellee's purchase consists of appellee's rather vague testimony that the agent described this plan as an "investment." Proof of fraud must be clear and convincing, and of a high degree of cogency. The foregoing testimony is in-

sufficient to prove any representation that appellee would acquire a proprietary interest in the company. Furthermore, in view of the dividend, cash value and annuity features of the contract, use of the word "investment" by appellant's agent is not fraudulent. The applications, forms, policies and other materials exhibited to appellee, read to her, signed by her and retained by her are so clearly referable to a life insurance contract that appellee could not have been misled as to the nature of her purchase.

ARGUMENT

1. There was no evidence of a representation that appellee would have a proprietary interest in the company.

Appellee did not testify that Burchfield told her she would have a proprietary interest in the company, nor do any of the exhibits contain such a representation. Appellee's rather vague testimony that "he said we could invest" (Tr. 7), etc., hardly constitutes a basis for a finding that appellant's agent "falsely represented to the plaintiff that she was purchasing company ownership policies." The only direct evidence on the point is the testimony of Burchfield as follows:

"Q. And you represented to her that this was an investment in your company; isn't that right?

A. No, Sir." (Tr. 73)

"We repeat the statements made in several of our previous decisions, that a party who alleges fraud has the burden of proof and that nothing short of a *high degree of cogency* will suffice." *Bel-*

anger v. Howard, 166 Or. 408, 414, 112 P.2d 1022, 1024 (1941).

Evidence of fraud must be "clear and satisfactory." *Metropolitan Casualty v. Lesher*, 152 Or. 161, 167, 52 P.2d 1133, 1136 (1935), *Reinhardt v. Weyerhaeuser Timber Company*, 47 F. Supp. 335, 336 (D.C. Oregon 1942), affirmed 144 F.2d 278 (9th Cir. 1943).

2. There was no evidence that appellant's agent made any misrepresentations concerning dividends.

"He said we would receive dividends" (Tr. 8, see also similar testimony on Tr. 9, 16). This is the only evidence on the record concerning Burchfield's statements regarding dividends. Appellant sees no fraud: The contract issued (Def's. Exs. 12-14) provides for dividends at the end of the second policy year and annually thereafter (P. 6, Def's. Exs. 12-14). Appellee did not maintain the policy for two years, and there is no evidence that she would not have received dividends in due course. It is also possible that appellee's testimony that Burchfield told her that "we would receive dividends" may have reference to the guaranteed annuity feature of the contract (see rider following page 18 of Def's. Exs. 12-14). Burchfield no doubt explained to appellee that she would receive annual payments, and, in fact, she did, just as provided in the contract: On March 3, 1964, appellee received annuities totaling \$288.35 (Tr. 42-3, Def's. Ex. 18).

There is no "clear and convincing" evidence of "a

high degree of cogency” that appellant’s agent made any statements justifying a finding of a fraudulent misrepresentation “that she would realize substantial income from the investment in the future.”

3. There was no evidence that appellant’s agent made any misrepresentations concerning “investment.”

Appellee testified that “he said we would invest” (Tr. 7), “we were to get investments” (Tr. 9), “I thought that they were investments all the time. That’s the way they were represented to me” (Tr. 56). Appellant’s agent readily admitted that he used the term “investment” in dealing with appellee. “It was investing in a life insurance policy” (Tr. 68). “It was an investment in a life insurance contract” (Tr. 73).

The use of the word “investment” in connection with the purchase of a contract of this sort is not fraud. The contract provides for a substantial guaranteed annual annuity (see rider following p. 6, Def’s. Exs. 12-14) and for accumulating cash surrender values (pp. 8, 13, 14, Def’s. Exs. 12-14).

In *Lynch v. Kerslake*, 173 N.W. 147 (Iowa 1919), the defendant maker of a note for a life insurance premium interposed a defense based upon fraud, alleging, among other things, that the plaintiff agent fraudulently stated “that it was not a life insurance policy, but an investment policy.” The contract was a life insurance policy with a 20-year endowment. The court in finding for the plaintiff disposed of this defense as follows:

“The fourth allegation of fraud, to wit, that the

defendant would receive an investment policy and not a life insurance policy, is of course a statement of a fact. *The issue is an investment and life insurance policy.* It is a 20-year endowment policy. The fruits of the policy would not depend entirely upon the life of the insured.” (Emphasis supplied) 173 N.W. at 149.

In Re Leuthold's Estate, 324 P.2d 1103 (Wash. 1958), involving estate taxation, the court described a policy similar to that involved herein:

“These policies were all level-premium, straight life policies. the cash value of which increased each year as specified therein.

“This type of policy is both an indemnity and an investment.” (Emphasis supplied) 324 P.2d at 1106.

The Washington court quoted a work by McLean on life insurance as follows:

“The level-premium plan, in fact, introduces an entirely new element into the scheme of operation: the *invested fund formed by the excess payments*. . . . It is thus evident, as already pointed out, that *the plan is not pure insurance but rather a combination of a decreasing insurance with an increasing investment*, the two amounts being computed mathematically in such a way that in any year their sum is equal to the ‘face amount’ payable under the policy.” (Emphasis supplied) 324 P.2d at 1106.

The word “investment” is commonly used in sales of items having *no* investment features whatsoever. For example, see advertisement by Art Metal, Inc. on p. 8D of

the September, 1966 issue of *Fortune*, proclaiming that their "executive chair" is a "solid investment." That is gilding the lily. However, it is certainly legitimate and natural for a salesman to use the word "investment" in connection with a policy containing the *genuine investment features* of the one involved herein.

Appellant does not contend that no fraud would have been committed if its agent had in fact led appellee to believe that she was purchasing a proprietary interest in the company. However, there is no colorable evidence, let alone "clear and convincing" evidence "of a high degree of cogency," of any statements or representations by appellant's agent upon which appellee could have formed such an impression; we have only appellee's somewhat vague recollection of the use of the word "investment." This is no basis for a finding of fraud.

4. Appellee was not in fact misled as to the nature of her purchase.

The demonstrable evidence of the dealings of appellee and appellant's agent indicate that the agent did not undertake to deceive appellee as to the true nature of her purchase, and that she could not have in fact been misled as to the nature of her purchase. The uncontroverted evidence is to the effect that:

(1) Appellee executed applications to appellant (Def's. Exs. 1, 2, 4) after designating a "beneficiary" and "contingent beneficiary" and supplying information as to her health. Mr. Burchfield read the questions to her, and she supplied the answers (Tr. 22, 82).

(2) Appellee signed amendment of application forms (Def's. Exs. 5-7) which contain numerous plainly visible references to the "policy."

(3) Appellee received a letter from appellant (Pl. Ex. 1) which describes the policy in terms which leave no room for a supposition that the policyholder is an investor in the company in the sense appellee claims to have understood.

(4) Appellee took a physical examination (Tr. 36).

(5) Appellee signed a form entitled "Answers Made to the Medical Examiner" (Def's. Ex. 9) which contains answers to questions relating to health, answers to questions clearly relating to insurance (see Questions 9, 14), and a certification that appellee understood that the answers might be "considered the basis of any insurance issued hereon."

(6) Appellee received the policies, which could not more plainly be policies of insurance (see the plain references in the opening page of Def's. Exs. 12-14 to "Policy Number," "Insured," "AMOUNT OF INSURANCE," "First ANNUAL Premium," "PREMIUM TABLE," etc.).

It is possible that appellee did not entirely understand the nature of her contract with appellant; appellant certainly does not contend that appellee is learned in insurance terminology. However, it seems unlikely indeed that a woman who owns and operates a 13,000-acre cattle ranch with a thousand head of stock, and who had previously purchased and owned life insurance (Tr. 15), could be subjected to all the foregoing and yet

believe that her purchase here was entirely an investment in the company in the strict sense of the word.

CONCLUSION

It is not unreasonable to suggest that appellee's troubles stem not from what appellant's agent told her, but from the advice she received from appellant's competitors. Appellee was apparently satisfied with her policy and the annuity received thereon until July 1964, when she was called upon by representatives of Investors Insurance Corporation of Oregon (Tr. 54, 62). These representatives called on appellee twice and sold her six policies after telling her that appellant's policies "weren't any good" and that "their's were better" (Tr. 54). Appellee admitted on cross examination that she did not conclude that appellant's agent had misrepresented appellant's contracts until the second visit of Mr. Westphal of Investors Insurance Corporation of Oregon (Tr. 53).

Whatever the source of appellee's dissatisfaction, and whatever she now conceives her understanding of appellant's policies to have been, the fact remains that there is no "clear and convincing" evidence "of a high degree of cogency," or even reasonably competent evidence, that appellant's agent made fraudulent misstatements of fact.

Respectfully submitted,

CAKE, JAUREGUY, HARDY, BUTTLER
& McEWEN

By: JOHN R. FAUST, JR.

Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN R. FAUST, JR.
Of Attorneys for Appellant

No. 21139

United States
COURT OF APPEALS

For the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE
COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

BRIEF OF APPELLEE

*On Appeal from the United States District Court
for the District of Oregon*

FILED

NOV 14 1966

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FEB 15 1967

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United States
COURT OF APPEALS
For the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE
COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

BRIEF OF APPELLEE

*On Appeal from the United States District Court
for the District of Oregon*

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered in the United States District Court for the District of Oregon on May 8, 1966. The action was brought by appellee Margaret Hackelman against appellant Reliance National Life Insurance Company, asking \$1,750 general damages and \$10,000 punitive damages for fraud and deceit. Appellant denied any liability. Appellee is a resident of the State of Oregon. Appellant is a corporation organized and existing under the laws of the State of Utah. Jurisdiction is based upon 28 U.S.C. 1332(a)(1).

QUESTION PRESENTED

Was there evidence to support the findings of the trial court, sitting as a trier of fact, that:

1. There were false representations made by appellant's agent regarding "investment" by appellee, dividends to be received by appellee, and the purchase by appellee of a proprietary interest in appellant company.
2. Appellee was actually misled as to the nature of her purchases.

SUMMARY OF ARGUMENT

There is evidence that appellant's agent offered appellee an investment in appellant company. There is evidence that the negotiations between appellant's agent and appellee were couched throughout in terms of investment, not life insurance. There is evidence that the discussion of dividends was intimately connected with the discussion of "investments." There is evidence that appellee was misled into believing she was purchasing a proprietary interest in appellant company, and not buying life insurance. Since the findings of fact are supported by testimony, the trial judge had the right to accept the testimony as true and there is no basis for setting aside his findings as clearly erroneous.

ARGUMENT

1. There was evidence that appellee was defrauded by appellant.

The elements of actionable fraud have been defined in Oregon as follows:

- (a) A representation,
- (b) Its falsity,
- (c) Its materiality,
- (d) The speaker's knowledge of its falsity or ignorance of its truth,
- (e) His intent that it should be acted on by the person and in the manner reasonably contemplated,
- (f) The hearer's ignorance of its falsity,
- (g) His reliance on its truth,
- (h) His right to rely thereon,
- (i) His consequent and proximate injury.

Conzelmann v. Northwest Poultry & Dairy Products Co., 190 Or. 332, 350, 225 P.2d 757, 764 (1950). These elements have been recognized by this Court in *Equitable Life & Casualty Ins. Co. v. Lee*, 310 F.2d 262, 267 (9th Cir. 1962).

The burden of proof in civil actions is defined in ORS 17.250(5) as "a preponderance of the evidence." An action for fraud and deceit is a civil action. Several Oregon cases have proclaimed a higher burden of proof in fraud and similar actions, apparently on the theory that there is a presumption against wrongdoing and in favor of the fairness and reasonableness of transactions. This burden has been described as requiring "clear and satisfactory evidence." *Metropolitan Casualty Ins. Co. v. Leshner*, 152 Or. 161, 167, 52 P.2d 1133 (1935); *Conzel-*

mann v. Northwest Poultry & Dairy Products Co., *supra*, at 350, 225 P.2d at 765 (“clear, satisfactory and convincing”); accord, *Equitable Life & Casualty Ins. Co. v. Lee*, *supra*, at 267. This higher standard does not appear in the Oregon statutes, and the most recent statement of the Oregon Supreme Court suggests that the language of ORS 17.250(5) sets the correct standard. *Medak v. Hekimian*, 241 Or. 38, 46, 404 P.2d 203, 207 (1965) (holding an instruction that in cases involving fraud or estoppel the burden was “clear, convincing and satisfactory evidence” was error as to estoppel; not specifically discussed as to fraud).

There was evidence that Burchfield, appellant’s agent, told appellee on the occasion of his first visit to her that he had an “investment” in which she might be interested (Tr. 7). Appellee testified that she was told “we would receive dividends . . . but there would be life insurance privileges” (Tr. 8). “[W]e were to get investments and this life insurance with it” (Tr. 9). Burchfield knew that this was an ordinary life insurance policy (Tr. 67-8), yet he told her it was an investment in his company:

“Q. Did you tell her that she was investing money in your company?

A. Yes” (Tr. 68).

He admitted that this was not an accurate picture of the proposed transaction:

“Q. . . . And this was not an investment, was it?

A. Not in the sense that you would invest in stocks or bonds or building, no. It was investing in a life insurance policy” (Tr. 68).

Not only were appellant's agent's statements misleading, but the title of these life insurance policies — "Estate Accumulator Contract" (Pl.'s Exs. 12, 13, 14)— were themselves misleading, as the trial judge found: ". . . [H]ere is language on the front of the policy that would indicate not that it was a life insurance policy, but that it was some type of an investment that she was about to enter . . . I think that the company policy, together with the way that the approach was made by the agent, does amount to a misrepresentation of what the policy really was" (Tr. 95).

From all this the trial court could have concluded that appellant's agent made material misrepresentations which induced appellee to purchase appellant's policies. Even promises of "dividends" (Tr. 8, 9) were part and parcel of the representations concerning "investments" in the agent's company, and the fact that appellee received one annuity (Tr. 42-43) does not vitiate the fact that appellee was induced to enter into an obligation to make periodic life insurance premium payments, which she did not desire to do.

These representations thoroughly misled appellee: "I thought they were investments all the time. That's the way they were represented to me" (Tr. 56). "Well, he never explained it any other [sic] than it was an investment" (Tr. 57). She believed she was purchasing single payment investments (Tr. 33). Her financial position was such that she could not afford to pay as much as \$1500 every year on premiums (Tr. 31, 34). Without the statements and assurances of Burchfield, she would never have purchased the policies (Tr. 21).

In Oregon, even circumstantial evidence may be sufficient to prove fraud. *Mergenthaler Linotype Co. v. Evans*, 69 F.2d 287, 289 (9th Cir. 1934). In the instant case there was direct testimony from which the trial court could have found fraud. The judge had the benefit of observing the witnesses, a fact which he acknowledged aided him in resolving this case. "Gentlemen, I closely observed the plaintiff here, and I am convinced that she is telling it just the way it happened" (Tr. 94-5). "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. Rules Civ. Proc. Rule 52(a), 28 U.S.C. *Equitable Life & Casualty Ins. Co. v. Lee, supra*, at 268.

Even if these misrepresentations had been innocent, the proof was sufficient to give appellee the remedy of rescission, or a return to the *status quo ante*, which remedy is in effect what she received in this case. All that is required in such cases is proof of representations concerning a material fact, its falsity, and reliance. *Amort v. Tupper*, 204 Or. 279, 282 P.2d 660 (1955).

The trial court should be affirmed.

CONCLUSION

There was sufficient evidence to satisfy appellee's burden of proof with regard to fraud, whether that burden was the statutory requirement of "a preponderance of the evidence," or that stated in some of the cases as "clear and satisfactory evidence." The findings of the trial court, aided as they were by the opportunity to personally observe the witnesses, were not clearly erroneous, and should be affirmed.

Respectfully submitted,

RIVES & RODGERS

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Attorneys for Appellee

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals, for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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United States
COURT OF APPEALS
for the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE
COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

REPLY BRIEF OF APPELLANT

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COURT OF APPEALS
for the Ninth Circuit

RELIANCE NATIONAL LIFE INSURANCE
COMPANY,

Appellant,

v.

MARGARET HACKELMAN,

Appellee.

REPLY BRIEF OF APPELLANT

ARGUMENT

Medak v. Hekemian, 241 Or. 38, 404 P.2d 303 (1965), cited by Appellee, does not reverse the well-established rule in Oregon that evidence of fraud must be “clear and convincing” and “of a high degree of cogency” (see cases cited Appellant’s Br. 5-6, Appellee’s Br. 3-4). The appellants in *Medak* did not object to the court’s instruction that fraud must be proved by clear, convincing and satisfactory evidence; they objected only to the instruction that an *estoppel* must be so proved, and so the propriety of the instruction

as to fraud was not an issue on appeal, and was not commented upon by the court.

In the instant case, the fact of primary importance remains: There was no evidence whatsoever that Appellee was told she was acquiring a proprietary interest in the Appellant company.

The testimony of Appellant's agent Burchfield excerpted on page 4 of Appellee's Br. is hardly an admission that he misled Appellee, particularly when read in context:

“Q. Did you tell her that she was investing money in your company?

A. Yes.

Q. You did tell her that?

A. Yes.

Q. But she wasn't investing money in your company, was she?

A. The —

MR. McEWEN: The contracts are in evidence, your Honor. I think that is —

THE COURT: Well, no. Let's get his understanding.

Q. (By Mr. Morrell): She was paying the first year's premium on the policy?

A. Yes. A life insurance policy, yes.

Q. Yes. And this was not an investment, was it?

A. Not in the sense that you would invest in stocks or bonds or building, no. *It was investing in a life insurance policy.*

Q. But you told her that she was investing in your company?

A. *In a life insurance policy* represented by Reliance National Life Insurance of Salt Lake City, Utah.” (Tr. 68).

Burchfield told Appellee she was investing in life insurance, and in truth she was. As quoted in Appellee’s Brief, she expected that “we were to get investments and this life insurance with it” (Tr. 9), and this accurately describes just what Appellee got: Appellee’s Brief makes no attempt whatsoever to meet Appellant’s arguments and authorities to the effect that *this policy, which provided for annuities, for an accumulating cash surrender value and for dividends based on the company’s earnings, can fairly and reasonably be characterized as both insurance and an investment.* (See Appellant’s Br. 7-9).

Appellee and the lower court emphasize the caption of Appellant’s policy: “Estate Accumulator Contract.” While this may be a rather fancy caption for a life insurance policy (but no fancier than many others in use), *this caption in no way suggests a proprietary interest in the company,* which Appellee alleges to have been promised, and the briefest glance at the policy makes plain its substance (see the plain references in the opening page of Def. Exs. 12-14- to “Policy Number,” “Insured,” “AMOUNT OF INSURANCE,” “First ANNUAL Premium,” “PREMIUM TABLE,” etc.).

Appellee’s Brief also makes no comment on the many dealings between Appellee and Appellant which must have made the nature of her purchase abundantly clear to her (see Appellant’s Br. 9-10).

The opportunity of the trial judge to view the witnesses is not significant here, because Appellee does not argue that Appellant's agent's testimony is untruthful (to the contrary, Appellee quotes him), and Appellant does not contend that Appellee's testimony is untruthful in any respect. The significant aspect of the testimony is not what the lower court heard, but what it did *not* hear: Never did Appellee or anyone else testify that she was told she would receive a proprietary interest in the company, and nothing given her by Appellant even suggests such a promise. Her present allegation that she was to have a proprietary interest has no basis in the record other than her vague recollection of the use of the word "investment," a term which, used in connection with a policy of this nature, was hardly fraud.

CONCLUSION

Appellee obviously has "buyer's remorse," probably inspired by the efforts of Appellant's competitors (see Appellant's Br. 11), but she does not have a cause of action for fraud. The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellant

No. 21149 ✓

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

AMERICAN CEMENT CORPORATION,

Appellant,

vs.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Appellee.

Upon Appeal from the United States District Court,
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF

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No. 21149

IN THE
United States Court of Appeals
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AMERICAN CEMENT CORPORATION,

Appellant,

vs.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Appellee.

Upon Appeal from the United States District Court,
Southern District of California, Central Division.

APPELLANT'S OPENING BRIEF

Jurisdiction

This action was instituted in admiralty in personam by appellant, American Cement Corporation, against Healy Tibbitts Construction Company, claiming for damage to its Barge No. 41 (\$13,457.80) and for wrongful withholding of money (\$9,426.39). The action arising out of a contract for chartering barges and a maritime accident on navigable waters came within the admiralty and maritime jurisdiction of the District Court of the United States.¹ The trial court found such jurisdiction to exist.²

¹ 28 U.S.C., Section 1333(1).

² Conclusion 1.

The case was tried before the Honorable Thurmond Clarke, United States District Judge, sitting in admiralty, commencing December 8, 1965. An opinion was filed by Judge Thurmond Clarke February 7, 1966.³ Appellant filed a motion to consider further and rule on an issue raised but omitted from the opinion.⁴ The motion was denied and counsel for third-party respondent Garvin Towboat and Barge Company was instructed to complete the findings of fact and conclusions of law consistent with the conclusions in the opinion.

Findings of Fact, Conclusions of Law and Final Decree were entered February 28, 1966.⁵ Within 90 days thereafter, on May 26, 1966, a Notice of Appeal was filed⁶ pursuant to the Order of Court Allowing Appeal dated May 26, 1966.⁷

Statement of the Case

Appellee Healy Tibbitts Construction Company (hereinafter referred to as "Healy Tibbitts") entered into a contract with the Department of Fish and Game of the State of California for construction of artificial fish reefs off Imperial Beach, California. In the fall of 1963, Richard H. Smith, Southern California Area Manager for Healy Tibbitts, and Charlton Dunn, Jr., General Man-

³ Clk.Tr. 19.

⁴ Clk.Tr. 26.

⁵ Clk.Tr. 32, 37.

⁶ Clk.Tr. 43.

⁷ Clk.Tr. 41; 28 U.S.C., Section 2107.

ager of the Catalina Rock Division of American Cement Corporation (hereinafter referred to as "American") discussed the possibility of American supplying the rock for the fish mound.⁸ The initial discussions contemplated American furnishing the rock at a fixed price per ton F.O.B. Healy Tibbitts' barges at the quarry on Catalina Island.⁹ Healy Tibbitts subsequently requested a price for rock delivered to the Imperial Beach job site on American's barges. Then Mr. Smith became concerned about possible demurrage costs so Mr. Smith and Mr. Dunn arrived at an arrangement under which American's barges were chartered to Healy Tibbitts for one trip to the job site at a fixed price regardless of the time involved.¹⁰ Healy Tibbitts hired Garvin Towboat and Barge Company (hereinafter referred to as "Garvin") to tow American's barges while under charter.¹¹

Healy Tibbitts issued a purchase order to Riverside Cement Company (American) dated January 6, 1964, confirming the rock price per ton F.O.B. barges Catalina and the charter hire rate for Barge No. 41 and Barge No. 42 and also the rate for furnishing an ESCO Orange Peel Bucket.¹² The charter of Barge No. 41 commenced at about 2:00 A.M. January 6, 1964, when the barge was taken in tow at Long Beach by a Garvin tug which then proceeded to American's quarry at Catalina. On

⁸ R.Tr. 18.

⁹ R.Tr. 18-19.

¹⁰ R.Tr. 19.

¹¹ R.Tr. 21-2, 66.

¹² R.Tr. 22; Exh. 2.

January 6, 1964, American loaded Barge No. 41 with 1966 tons of rock following which the Garvin tug took the barge in tow and proceeded on its voyage to Imperial Beach.¹³ En route to Imperial Beach on the morning of January 7, 1964, the barge took an unexpected and unexplained list to starboard, its cargo of rock shifted and slid into the sea, tearing away a portion of the barge's starboard bulwark.¹⁴ Barge No. 41 was towed back to Long Beach where Healy Tibbitts and its underwriters arranged for a survey¹⁵ and obtained bids to repair the barge.¹⁶ Healy Tibbitts refused to pay for the barge repairs so American paid the low bidder, Long Beach Marine Repair Company, \$8,404.00 for making the repairs.¹⁷ Also, Healy Tibbitts would not pay American's invoice for the rock furnished and claimed other damages resulting from the January 7, 1964 accident for which it backcharged or withheld \$9,426.39 from American.¹⁸

American filed a libel in admiralty against Healy Tibbitts to recover the \$8,404.00 repairs to Barge No. 41 (during the course of trial, American dropped its \$4,800.00 detention and \$253.80 surveyor fee claims) and the \$9,426.39 wrongfully withheld.¹⁹ American

¹³ Finding No. 8.

¹⁴ Finding No. 8.

¹⁵ R.Tr. 105-7; Exh. 10.

¹⁶ R.Tr. 118-9; Exh. 15.

¹⁷ R.Tr. 31; Exh. 5.

¹⁸ R.Tr. 32-3.

¹⁹ Clk.Tr. 2.

asserted that Healy Tibbitts had agreed to bareboat charter Barge No. 41 and further agreed to assume the responsibility or the risk of damage to the barge while Healy Tibbitts was using the barge. Healy Tibbitts answered generally denying American's allegations and filed a petition under Admiralty Rule 56 and a cross-libel against Garvin and American asserting that the barge listed, dumped the rock and was damaged because the barge was unseaworthy and/or improperly loaded by American and/or negligently towed by Garvin.²⁰ The assertions of Healy Tibbitts were denied by American and Garvin.

All issues were vigorously contested at trial and briefs submitted. Judge Thurmond Clarke filed a seven page opinion ruling that the barge casualty was an accident of the sea which occurred without fault on the part of anyone and characterized the charter as bareboat under which Healy Tibbitts became owner *pro hac vice* but that such a relationship did not impose responsibility on Healy Tibbitts for damage in the absence of negligence.²¹ Therefore, American recovered the \$9,426.39 withheld by Healy Tibbitts but not the \$8,404.00 it paid to have the barge repaired.²²

The opinion did not mention or rule on one of the issues presented, namely, whether as a matter of contractual agreement Healy Tibbitts assumed the responsibility or risk of accident or damage to Barge No. 41

²⁰ Clk.Tr. 10.

²¹ Clk.Tr. 19.

²² Clk.Tr. 37.

while under charter and, hence, was obligated to pay for the \$8,404.00 damage. Appellant filed a motion to consider further and rule on the aforesaid issue.²³ There was a short hearing at which the motion was denied from the bench and counsel for Garvin instructed to complete the findings of fact and conclusions of law so as to be consistent with the ultimate result in the opinion.

Findings of Fact, Conclusions of Law and Final Decree were entered February 28, 1966.²⁴ Appellant thereupon appealed in part from the decree in that the decree failed to order that American recover from Healy Tibbitts \$8,404.00 cost of repairing the barge.²⁵ The only question involved in this appeal is whether Mr. Smith, for Healy Tibbitts, and Mr. Dunn, for American, agreed that Healy Tibbitts would have the responsibility or risk of accident or damage to Barge No. 41 while it was under bareboat charter to Healy Tibbitts.

Specifications of Error

1. The District Court erred in finding:

“Under the terms of said agreement Healy Tibbitts did not undertake and was not obligated to return said barges in the same good order and condition as when received.” (Finding 6 in part.)

2. The District Court erred in failing to find that:

²³ Clk.Tr. 26.

²⁴ Clk.Tr. 32, 37.

²⁵ Clk.Tr. 41, 48.

(a) "Under the terms of the agreement between American and Healy Tibbitts, Healy Tibbitts agreed to assume the risk of damage to said barges or to return said barge in the same condition as when received, ordinary wear and tear excepted."

(b) "From January 31, 1964, there was and is now due and owing to American from Healy Tibbitts the sum of \$8,404.00 for the cost of repairing damage to Barge No. 41 suffered while said Barge was being operated by Healey Tibbitts as bareboat charterer."

3. The District Court erred in failing to make a conclusion of law that:

"American is entitled to recover the sum of \$8,404.00 from Healy Tibbitts together with the interest thereon at the rate of 6% per annum from and after January 31, 1964."

4. The District Court erred in failing to order, adjudge and decree that:

"American Cement Corporation have and recover from Healy Tibbitts Construction Company the sum of \$8,404.00 together with interest thereon at the rate of 6% per annum from January 31, 1964, to the date hereof in the sum of \$1,047.16."

Summary of Argument

Mr. Dunn of American testified clearly and consistently that Healy Tibbitts agreed to assume the responsibility or risk of damage to Barge No. 41 during the charter. Mr.

Smith of Healy Tibbitts attempted by vague generalities to deny that Healy Tibbitts had the responsibility but, on specifics, Mr. Smith's testimony is consistent with Healy Tibbitts having the risk and when Mr. Smith's testimony is combined with the Purchase Order of Healy Tibbitts signed by Mr. Smith, it is admitted by Mr. Smith that Healy Tibbitts had the risk of damage when the accident occurred. Undisputed facts and the actions of Healy Tibbitts are consistent only with Healy Tibbitts having all responsibility during the charter. Further, Healy Tibbitts' business records demonstrate that Healy Tibbitts had the risk at the time of the accident.

Argument

The only oral testimony on the issue of who had the risk of damage to Barge No. 41 during the charter to Healy Tibbitts was by Mr. Dunn of American and Mr. Smith of Healy Tibbitts. In fact, the negotiations and agreements were exclusively between those two. The documentary evidence pertinent to the issue was:

(1) Purchase Order dated January 6, 1964, prepared by Healy Tibbitts²⁶ ;

(2) Long Beach Marine Repair Company invoice of February 24, 1964, for \$8,404.00 barge repairs²⁷;

(3) United States Salvage Association report²⁸;

²⁶ Exh. 2.

²⁷ Exh. 5.

²⁸ Exh. 10.

(4) The January 6, 1964 Purchase Order as modified by Mr. Smith following the accident²⁹;

(5) Bids submitted for repairing the barge³⁰; and

(6) Healy Tibbitts' insurance broker's letter of April 1, 1964.³¹

Mr. Dunn testified specifically that Mr. Smith agreed that Healy Tibbitts would have the risk while the barge was under charter³². The general course of negotiations between Mr. Dunn and Mr. Smith³³ and the insurance arrangements are logical and consistent only with Healy Tibbitts having the risk during the charter. Mr. Dunn testified:

“Q Now, were there any discussions about insurance or coverage, did you discuss with Mr. Smith what insurance?

“A Yes.

“Q And what were those discussions?

“A I told Mr. Smith that our insurance upon the barges was \$25,000 deductible and we would be agreeable to naming him, or naming Healy Tibbitts Construction Company as co-insured on our policies, which would take care of the problem above

²⁹ Exh. 14.

³⁰ Exh. 15.

³¹ Exh. 16.

³² R.Tr. 20.

³³ R.Tr. 18-20.

\$25,000; that the risk under \$25,000 would be his problem to take care of; and Mr. Smith told me that he didn't think they wanted to carry that risk themselves; they would prefer to take out insurance to cover it.

And I told him that our insurance broker was Bayly, Martin & Fay, and specifically Mr. Webb Morrow.

He told me that his agent was, I believe he called him Bob Morrill, and gave me his telephone number. I gave that to Mr. Morrow, and Mr. Morrill and Mr. Morrow were to get together and work out the insurance and we were to be named co-insured under the policy that Healy Tibbitts took out; and we never did, so far as I know, receive evidence that we were named as co-insured, however, on their policies.

“Q Did you receive any report from American Cement Corporation's insurance broker, Mr. Webb Morrow as to what if anything had been done by Mr. Morrill with respect to coverage above \$25,000 which was American Cement Corporation's deductible, as I understand it?

“A Yes. He told me that he had arranged for Healy Tibbitts Construction Company to be named as co-insured on our coverage and that they had been named.

“Q And did you receive any report from Mr. Webb Morrow as to whether or not Healy Tibbitts'

broker had taken steps to cover the Barge 41 for the risk loss below \$25,000?

“A Mr. Morrow told me that Mr. Morrill told him that Healy Tibbitts had so covered that amount under the \$25,000 and he believed with a \$5,000 deductible.”³⁴

Mr. Smith on direct examination testified:

“Q Now, when you issued this purchase order and when you consummated your agreement with American, was it your intention to bareboat charter Barge 41?

“A No.

“Q And did you understand that you were bareboat chartering Barge 41?

“A No. It is not our custom to bareboat charter.”³⁵

On cross examination Mr. Smith testified:

“Q You, as I understand it, admit that Healy Tibbitts had care and custody and was responsible for the barge on the site?

“A Yes.

“Q Now, my question was, what was there about the transactions or the purchase order that changed the care and custody to Healy Tibbitts at the site?

³⁴ R.Tr. 20-1 and see Exh. 16.

³⁵ R.Tr. 65. The trial court found it was a bareboat charter (Finding 13).

“A Well, our tugboat — the small tugboat down there took it over and dispatched Garvin, yes.

“Q The change, the change in the tugboat at the site?

“A Well, the point is that I never saw this as anything but an F.O.B. proposition. So I assumed that we took responsibility upon delivery. Now, whether we paid 10 cents a ton or how we did it, it was still, in my thinking, an F.O.B. proposition.

“Q F.O.B. where?

“A Jobsite.

“Q Your understanding was that it was to be F.O.B. jobsite?

“A The mechanics of how they were paid didn't enter into it. In my thinking, this was an F.O.B. jobsite delivery, so we took custody upon delivery on the jobsite.

“Q And in your opinion, would Healy Tibbitts have the responsibility for the barge as soon as the F.O.B. transaction occurred?

“A Yes, yes.”³⁶

* * * *

“Q And that you, Healy Tibbitts was to accept, take the risk of any damage or loss to the barges while Healy Tibbitts had the use of the barges?

“A No. Mr. Dunn never mentioned any loss on the barges. I don't think it entered his mind.

³⁶ R.Tr. 87-8.

“Q Well, didn’t you discuss insurance?

“A Yes. I initiated the discussion of insurance, as I have said, because I wanted to know what would happen on the site, to be protected.

“Q But Healy Tibbitts has the use of those barges from the time that its tugboat, in this case GARVIN which it hired, picked up the barges until the tugboat returns the barges to American Cement, does it not?

“A Yes.

“Q And was not the insurance that was obtained covering the barges throughout that entire period, from the time that they were picked up by Garvin’s tugboat until they were taken over to Catalina and loaded, until it went down to Imperial Beach and until the barges returned to Long Beach and were redelivered to American Cement Company?

“A Yes. It was based upon one month’s coverage.

“Q And there was no restriction on the insurance coverage, that the insurance only attached while the barges were at the jobsite, was there?

“A It made no difference in the premium.

“Q Now, did you know whether or not you got insurance for a month or just for the trip?

“A It was my understanding it was one month.”³⁷

Patently, Mr. Smith's testimony is contradictory. The Healy Tibbitts' Purchase Order which Mr. Smith had prepared and signed specified F.O.B. delivery barges at Catalina,³⁸ Mr. Smith's own testimony confirms that Healy Tibbitts had responsibility for the barge as soon as the F.O.B. transaction occurred. The Purchase Order establishes an F.O.B. Catalina transaction. Therefore, by Mr. Smith's own admissions, Healy Tibbitts had the responsibility for the barge when the accident occurred.

If more need be said, the actions of Healy Tibbitts and its underwriters following the accident, as related by Mr. Smith, are consistent only with Healy Tibbitts having responsibility for the barge when the accident occurred. First Mr. Smith reported the accident to Healy Tibbitts' underwriters:

“Q Now, after the accident to Barge 41, did you make a report to your brokers or insurance company?

“A Yes. I wrote a letter to them.

“Q And when was that letter written?

³⁷ R.Tr. 92-3. Healy Tibbitts' insurance premium was a minimum \$100 per week or any part thereof (Exh. 16). American's insurance broker added Healy Tibbitts on Barges Nos. 41 and 42 coverage for “. . . . a single trip from Long Beach to Catalina thence to Imperial Beach until their rock cargo is discharged, and thereafter until the barges are returned to Long Beach.” R.Tr. 96.

³⁸ Exh. 2.

“A I can’t be sure.

“Q Do you have it with you?

“A No. I do not.

“Q Well, approximately when was it written?

“A I should say a day or two after the accident.

“Q And what did you advise?

“A Oh, I just described the accident and I think that was all. I asked him what help or what we would do next for his help.

“Q And were you advised anything?

“A No. I don’t think so, at that time.

“Q Later, were you advised to do anything?

“A I believe that Mr. Morrill arranged counsel and I talked to an attorney.”³⁹

Then, Healy Tibbitts’ underwriters brought in a surveyor:

“Q Did you ever bring in a surveyor to inspect the damage to the barge?

“A I believe while the barge was tied up, it must have been a week later, while the shipyards were assessing or estimating the cost to repair it, a local surveyor did look at the barge.

“Q Do you know which surveyor?

“A I can’t recall his name. I think he is from Long Beach.

³⁹ R.Tr. 103-4.

“Q Did you ever see a survey report which set forth the damage to Barge 41 received from the accident down off of Imperial Beach and the recommended repairs?

“A I think I did, yes. I must have.

“Q Do you know if that survey report was prepared by someone representing Healy Tibbitts?

“A I can't recall ever hiring a surveyor to look at the barge. Now, that may have taken place or may have been caused by Mr. Morrill, but I can't recall it.

“Q Well, was it possible that you had talked with Mr. Morrill on the telephone before writing the letter to Mr. Morrill?

“A Yes, I think I told him the day of the accident, I think I called him and told him there had been an accident.

“Q And have you ever heard of the United States Salvage Association?

“A Yes.

“Q Do you remember whether or not United States Salvage Association acted on behalf of Healy Tibbitts' interests?

“A Well, U. S. Salvage was not the surveyor I had in mind, no. No, I don't recall U. S. Salvage being interested in this initially, or at any time for that matter.

“Q I would like to read you from Libelant’s Exhibit 10, which is on United States Salvage stationery. Are you familiar —

“A Yes.

“Q And it says, “BARGE ‘GRAHAM NO. 41’

“Report of survey made by the undersigned surveyor of the United States Salvage Association, Incorporated, on January 10, 1964 at the request of American National General Agencies Inc., Los Angeles on the barge ‘GRAHAM NO. 41’ 83 gross tons, 253532 official number, Healy-Tibbitts Construction Co. Owners and Operators, while lying afloat at Berth 58, Long Beach California.”

I will hand you this report and ask you if you have seen it before?

“A Well, since my name is on it, I must have been present when the survey was made. I don’t recall seeing the survey, reading the survey. I remember Mr. Kornegay presiding over the opening of the bids, but this was not done on the 10th, or maybe it was, but —

“Q And that would indicate that United States Salvage Association was acting in behalf of Healy Tibbitts, would it not?

“A Well, it indicates that American —

“Q Or its underwriters?

“A — National General Agencies hired them to make a survey.

“Q Those were your underwriters?

“A Yes.”⁴⁰

Next, bids to repair the barge were obtained by Healy Tibbitts and opened in Mr. Smith’s office:

“Q Mr. Smith, I hand you Libelant’s Exhibit 15 and ask you if you recognize those sheets?

“A Yes, these are quotations on the repairs to the barge.

“Q Are those the bids that were solicited for the repair of Barge 41 following the accident down off of Imperial Beach?

“A Yes, they were.

“Q And do those sheets refresh your recollection as to whom the bids were addressed?

“A Well, I can see they are addressed to Healy Tibbitts.”⁴¹

* * * *

“Q Mr. Smith, where were the bids opened?

“A In our office.

“Q And you were there, were you not?

“A Yes.”⁴²

Further, Healy Tibbitts’ own business records clearly and without exception demonstrate that Healy Tibbitts

⁴⁰ R.Tr. 104-7.

⁴¹ R.Tr. 108.

⁴² R.Tr. 119.

had the risk of loss or damage to Barge 41 throughout the term of the charter as set forth below:

(1) Exhibit 16—Marsh, McLennan-Cosgrove & Co.'s (insurance brokers for Healy Tibbitts) letter of April 1, 1964, to American National General Agencies, Inc. (Healy Tibbitts' underwriters) confirming that American National earned \$100 premium for Barge 41 being at the risk of Healy Tibbitts for the period January 6, 1964—0200 to January 8, 1964—0830 (the times Tug GARVIN picked up and returned the Barge to American's Seventh Street Terminal at Long Beach).

(2) Exhibit 14—Healy Tibbitts' purchase order dated January 6, 1964, as modified. After the accident, Mr. Smith changed the purchase order so that the rock would be furnished by American F.O.B. barges Imperial Beach rather than F.O.B. barges Catalina Island in order that Healy Tibbitts would not have the risk during the tow Catalina Island to Imperial Beach or back to Long Beach.

(3) Exhibit 10—United States Salvage Association survey report. Healy Tibbitts' underwriters called in United States Salvage to survey the damage to Barge 41. United States Salvage Association certainly must have been advised and understood that the damage to Barge 41 was Healy Tibbitts' responsibility because its report refers to Healy Tibbitts as the owner and operator.

(4) Exhibit 15—The bids submitted for repairing Barge 41 were addressed to Healy Tibbitts and opened in Mr. Smith's office with Mr. Smith in attendance.

The record in this case warrants under the clearly erroneous criterion, reversing that part of Finding 6 which ruled Healy Tibbitts “was not obligated to return the barges in the same good order and condition as when received.” However, in this case the criteria of judicial review in *Oliver J. Olson & Co. vs. Luckenbach Steamship Company* (9th Cir. 1960) 279 F.2d 662, 668, and *Arnolt Corp. vs. Stansen Corp.* (7th Cir. 1951) 189 F.2d 5, 10, would be more appropriate. Undisputed facts and the written record render such vague general denials of Healy Tibbitts’ responsibility, which Mr. Smith made at trial, extremely doubtful and of no probative value. Further, Mr. Smith’s oral testimony combined with Healy Tibbitts’ purchase order amount to an admission that Healy Tibbitts had the responsibility for the barge when the accident occurred. Can there be any doubt that the decree should be reversed in part to reflect that Healy Tibbitts was responsible for the barge damage as had been agreed?

Conclusion

As set forth in the specifications of error, the findings should be modified to provide that Healy Tibbitts did assume the risk of damage to the barge and to the findings, conclusions and decree there should be added provisions entitling American to recover from Healy Tibbitts \$8,404.00 with interest at the rate of 6% from and after January 31, 1964.

Respectfully submitted,

LILLICK, GEARY, MCHOSE & ROETHKE
LAWRENCE D. BRADLEY, JR.

Attorneys for Appellant

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAWRENCE D. BRADLEY, JR.



APPENDIX A

Table of Exhibits

<u>Libelant's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Received</u>
# 2 Purchase Order....	Page 22	Page 22	Page 22
# 5 Repair Bill	Page 30	Page 30	Page 31
#10 United States Salvage Association Report	(Received in evidence during testimony not transcribed.)		
#14 Purchase Order Modified	Page 102	Page 102	Page 102
#15 Repair Bids	Page 107	Page 107	Page 107
#16 Insurance Broker's Letter	Page 109	Page 109	Page 109

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN CEMENT CORPORATION,

Appellant,

vs.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Appellee.

APPELLEE'S ~~REPLY~~ BRIEF

FILED

OCT 20 1966

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NOV 4 1966

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OCT 10 1961

U.S. DISTRICT COURT

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2, 3

Appellee's Statement of the Case

Appellee's principal quarrel with the appellant's statement of the case is that most of the facts recited have nothing to do with the issue presented by this appeal. There were three parties involved in the action below. Appellant rented its barge to appellee. Appellant sold 3,600 tons of rock to appellee and agreed to load the rock on its barges at Catalina Island. Appellant loaded Barge No. 41 to its own satisfaction and then delivered the loaded barge to the Garvin Towboat & Barge Company. Garvin proceeded to tow the loaded barge from Catalina Island to the job site off the coast of California near San Diego. Enroute the barge took water and dumped a part of its load. The court found, contrary to the contentions of both the appellant and appellee, that none of the parties was negligent and that therefore each of them would have to bear its own losses. Not having ever had actual possession of either barge or cargo prior to the casualty, the appellee had contended below that the casualty was due either to the negligence of American Cement Corporation in furnishing an unseaworthy barge or its negligence in improperly loading the barge or alternately the negligence of Garvin in making the tow.

Appellant asserts that notwithstanding the foregoing the appellee must not only absorb its own losses but



those suffered by the appellant.

American asserts that the opinion of the court below did not rule that Healy Tibbitts did not agree to return the barge in the same condition as when it was received. Healy Tibbitts claims the opinion does cover this point. This ruling was implicit in the court's refusal to accept American's contrary contention asserted in its pleadings and throughout the trial. At the short hearing held following the rendering of the opinion of the court, the "contract theory" of American was again advanced. The court responded that its opinion was written in contemplation of that point and that the court had rejected it. The court then signed findings specifically negating American's contention. See Finding No. 6.

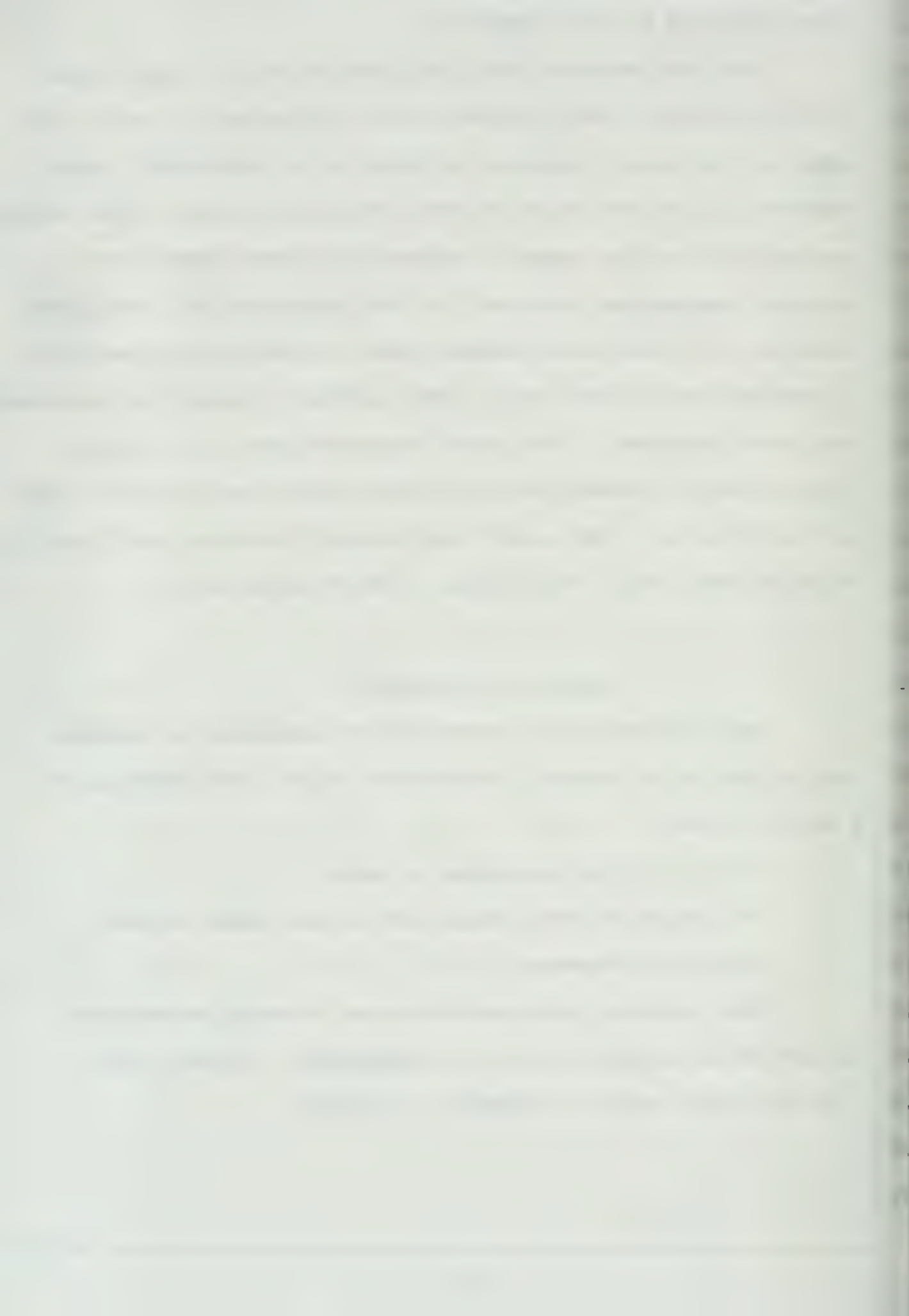
Question Presented

The only question presented by appellant is whether Finding No. 6 is "clearly erroneous" within the meaning of F.R.C.P. 52(a).

F.R.C.P. 52(a) provides in part:

"findings of fact shall not be set aside unless clearly erroneous. . . ."

The judicial interpretation of "clearly erroneous" is set forth in U. S. v. U. S. Gypsum Co., 333 U.S. 364, 396; 92 L.Ed. 746, 766 (1948) as follows:

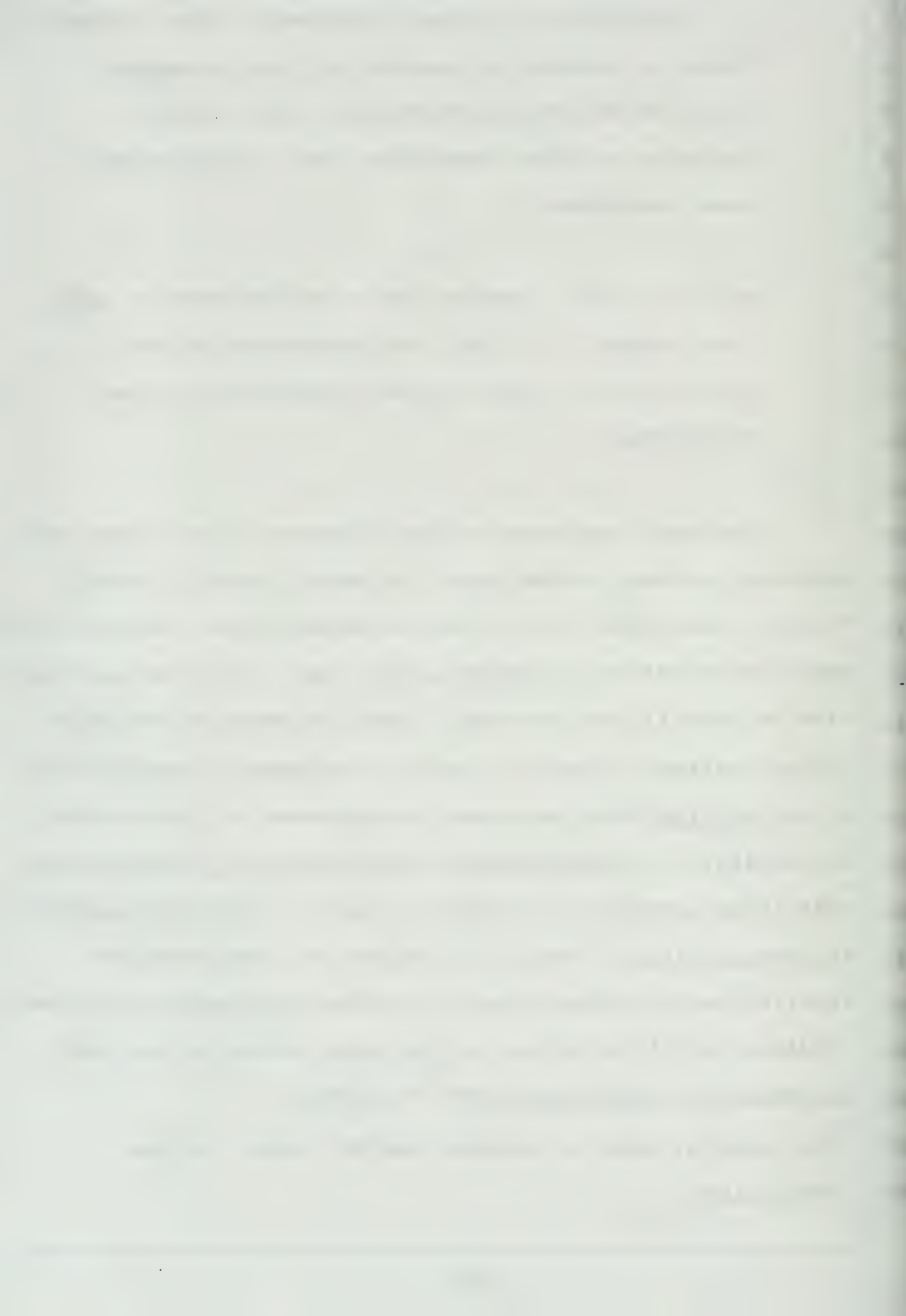


1 "A finding is 'clearly erroneous' when although
2 there is evidence to support it, the reviewing
3 court on the entire evidence is left with the
4 definite and firm conviction that a mistake has
5 been committed."

6
7 F.R.C.P. 52(a) requires the appellate court to take:
8 "due regard . . . [of] the opportunity of the
9 trial court to judge of the credibility of the
0 witnesses."

1
2 The oral testimony of the witnesses in this case was
3 directly contrary on the point in issue. Smith of Healy
4 Tibbitts testified that he did not agree in his contract with
5 American to return the barge in the same good order and condi-
6 tion as when it was received.¹ Dunn of American testified
7 to the contrary of Smith. Smith's testimony is corroborated
8 by the writing which embodied the agreement of the parties.
9 See Exhibit 2. Conspicuously absent from the written agree-
0 ment is any promise to return the barge in the same condition
1 as when received. Nor is it logical to infer that the
2 appellee had obligated itself to return the barge in the same
3 condition as it was prior to its being loaded by appellant
4 and prior to having been towed by Garvin.

5 ¹ See Page 88, Line 23 through Page 89, Line 2 of the
6 Transcript.



1 After hearing both Smith and Dunn, the court credited
2 the Smith oral testimony and accordingly made its Finding
3 No. 6.

4 Uniformly, the courts have upheld findings based on
5 one side of disputed and contradictory testimony. American
6 relies in this appeal on the criteria of review found in
7 Oliver J. Olson & Co. v. Luckenback S.S. Co., 279 F. 2d 662,
8 668 (9th Cir. 1960), to the effect that where the undisputed,
9 independent evidence is consistent only with one of the wit-
10 nesses, a finding will be upset if not in accordance with that
11 witness. American says the independent evidence is undisputed
12 and consistent only with Dunn's testimony and the finding,
13 based on Smith's testimony, therefore must be set aside.

14 In this brief Healy Tibbitts answers American. Healy
15 Tibbitts argues that by squaring the independent evidence
16 with the credited oral testimony of Smith, it is apparent that:

- 17 (1) The independent evidence is not inconsistent
18 with the credited oral testimony of Smith.
- 19 (2) The evidence itself is susceptible of varying
20 interpretations and supports conflicting infer-
21 ences. One set of the alternative inference
22 supports Smith; one set of inferences supports
23 American.
- 24 (3) The independent evidence was explained by Smith
25 in a manner making it consistent with the Smith
26 testimony; and

1 (4) On balance the independent evidence more force-
2 fully supports Smith than Dunn.

3
4 The independent evidence is certainly not
5 "so inconsistent with the oral testimony which the
6 trial court has credited [that the appellate court]
7 ought to override findings of fact based on such
8 oral testimony"

9 within the meaning of Oliver J. Olson & Co. v. Luckenback
0 S.S. Co., 279 F. 2d 662, 669 (9th Cir. 1960).

1 The question then is what independent evidence bears
2 on whether or not Healy Tibbitts agreed to return the barge
3 in the same good order and condition as when it was received.

4 First, there is the actual written contract of the
5 parties. See Exhibit 2. It is a purchase order issued by
6 Smith of Healy Tibbitts and accepted by Dunn of American.
7 The court found it to be a bareboat charter, see Findings
8 Nos. 6 and 13. Smith testified that the purchase order
9 represented the complete agreement of the parties.

10
11 The Contract

12 Transcript Page 64, Lines 18-24:

13 "Q Now, did the purchase order that you issued
14 reflect the deal as you understood it to be?

15 A Yes.

16 Q And the purchase order which you issued, was

1 this so far as you were concerned the contract that you
2 had with American?

3 A Yes."

4
5 Transcript Page 84, Line 15 through Page 85, Line 7:

6 "Q Now would you refer to Exhibit 2? Now what is
7 that document, Mr. Smith?

8 A That is our purchase order to Riverside
9 Cement Company.

10 Q And is that the purchase order that you were
11 referring to when you testified that a purchase order
12 reflected the deal between American Cement and Healy
13 Tibbitts?

14 A It is.

15 Q And that was supposed to represent the contract?

16 A Yes.

17 Q Does it represent all of the agreement between
18 yourself, for Healy Tibbitts, and Mr. Dunn for American
19 Cement?

20 A For this Barge?

21 Q Yes.

22 A For 41?

23 Q Yes.

24 A Yes."

25
26 Transcript Page 86, Lines 4-7:

"Q Were there other agreements between you and Mr. Dunn that were not included on your Healy Tibbitts purchase order?

A Not to my knowledge, no. "

It is obvious that the written agreement is not inconsistent with Smith's oral testimony to the effect that Healy Tibbitts did not agree to return the barge in the same condition as when received. There is no such promise in the written agreement.

Second, American points to the matter of insurance. Since Smith obtained insurance for a period which turned out to be inclusive of the dates of the charter, American argues that Healy Tibbitts must have considered itself to have full risk of the barge and to be under a contractual obligation to return the barge in the same condition as when received. Indeed, Smith did arrange for insurance. But that was on his own initiative as a matter of business prudence. It was not inspired by the contract terms but by the risks Smith considered existent when Healy Tibbitts took physical custody of the barge at the job site. This is consistent with the fact Smith considered the deal an F.O.B. job site proposition since Garvin, a third party, had possession of the barge when it was in tow between Catalina and the job site.

American did not bargain for the benefit of the Healy Tibbitts insurance coverage. It neither asked for it nor did

1 it pay for it. The terms and conditions of the agreement
2 between American and Healy Tibbitts are set forth in the pur-
3 chase order, Exhibit 2.

4
5 Transcript Page 87, Line 19 through Page 88, Line 11:

6 "Q Now, my question was, what was there about the
7 transactions or the purchase order that changed the
8 care and custody to Healy Tibbitts at the site?

9 A Well, our tugboat -- the small tugboat down
0 there took it over and dispatched Garvin, yes.

1 Q The change, the change in the tugboat at the site?

2 A Well, the point is that I never saw this as
3 anything but an F.O.B. proposition. So I assumed that
4 we took responsibility upon delivery. Now, whether
5 we paid 10 cents a ton or how we did it, it was still,
6 in my thinking, an F.O.B. proposition.

7 Q F.O.B. where?

8 A Jobsite.

9 Q Your understanding was that it was to be F.O.B.
0 jobsite?

1 A The mechanics of how they were paid didn't
2 enter into it. In my thinking, this was an F.O.B.
3 jobsite delivery, so we took custody upon delivery
4 on the jobsite."

5
6 During this period Healy Tibbitts did not have a

1 general liability policy, so Smith obtained insurance to cover
2 any risks he might have when the barge was under the control
3 of his employees at the job site.
4

5 Transcript Page 67, Line 22 through Page 68, Line 25:

6 "BY MR. HUGHEY:

7 Q At the time that you constructed these fish
8 mounds, did Healy Tibbitts have a general liability
9 policy or a policy of insurance which would cover its
0 employees for their negligence in using other people's
1 equipment?
2

3 A Not to my knowledge, no.

4 Q And did you, therefore, have a practice of taking
5 out insurance from time to time as to your custody of
6 other people's equipment?
7

8 A We had had some bad experience and we were
9 negotiating with several brokers at the time for a
0 blanket coverage, but at the time we didn't have it,
1 so we were spot insuring our jobs.
2

3 Q You say you had some bad experience. What do
4 you mean by that?
5

6 A Well, cases where the tower was liable, it
7 didn't cover the damage to the barge.
8

9 Q And was this a precautionary effect? Well,
0 did you take insurance in connection with Barge 41?
1

2 A Yes.
3

1 Q And what was the premium on that?

2 A It was very small. If I am not mistaken, it
3 was \$100 for each barge, a total of \$200, something
4 like that.

5 Q Now, did you regard this as a business prudence
6 measure or a precautionary measure, is this why you
7 took it, or did you have some other reasons for
8 getting this policy?

9 A Yes, I would say it was prudence. Certainly
0 there came a time when we would take custody on the
1 site and we had to be covered at that point."

2
3 Transcript Page 119, Lines 1-8:

4 "Q When you obtained the insurance for Barge 41,
5 were you insuring against perils of the sea and the
6 negligence of your employees when the barge was at the
7 jobsite after transit?

8 A Yes, that was my intention."

9
0 Transcript Page 86, Line 23 through Page 87, Line 7:

1 "Q Did you and Mr. Dunn agree that American
2 Cement would put Healy Tibbitts on its coverage so
3 that there would be a coverage in favor of Healy
4 Tibbitts above \$25,000?

5 A Yes.

6 Q Now, why was that done, if Healy Tibbitts was not

1 taking the risk of loss and damage?

2 A So that we had coverage on the site."

3
4 Transcript Page 88, Line 23 through Page 89, Line 2:

5 "Q All right, so in following your reasoning,
6 Healy Tibbitts took the responsibility for the barges
7 and all risk of loss and damage at Catalina when the
8 rock was placed on board the barges, isn't that
9 correct?

0 A No. Not in my mind."

1
2 Transcript Page 91, Line 21 through Page 92, Line 5:

3 "Q . . . Mr. Dunn told you that you could charter
4 or use 41 and 42 at a fixed price per ton?

5 A Yes.

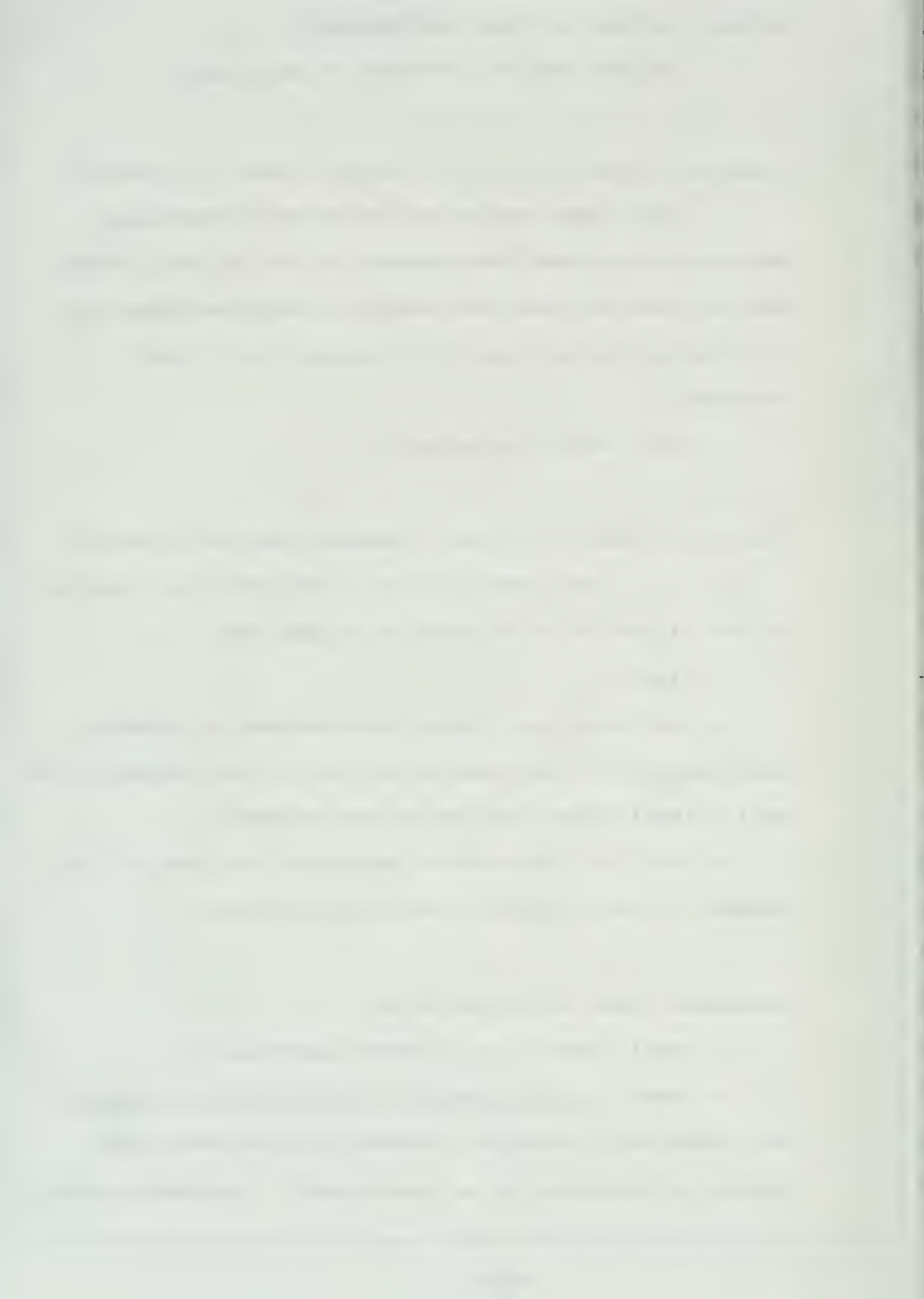
6 Q And that you, Healy Tibbitts was to accept,
7 take the risk of any damage or loss to the barges while
8 Healy Tibbitts had the use of the barges?

9 A No. Mr. Dunn never mentioned any loss on the
0 barges. I don't think it entered his mind."

1
2 Transcript Page 92, Lines 6-9:

3 "Q Well, didn't you discuss insurance"

4 A Yes. I initiated the discussion of insurance,
5 as I have said, because I wanted to know what would
6 happen on the site, to be protected." [Emphasis added.]



2 "Q And was not the insurance that was obtained
3 covering the barges through that entire period, from
4 the time that they were picked up by Garvin's tugboat
5 until they were taken over to Catalina and loaded,
6 until it went down to Imperial Beach and until the
7 barges returned to Long Beach and were redelivered to
8 American Cement Company?

9 A Yes. It was based upon one month's coverage.

0 Q And there was no restriction on the insurance
1 coverage, that the insurance only attached while the
2 barges were at the jobsite, was there?

3 A It made no difference in the premium."
4

5 Transcript Page 93, Line 20 to Page 94, Line 24:

6 "Q Now, Mr. Smith, when you issued instructions to
7 obtain insurance coverage on Barge 41, to whom did
8 you issue those instructions?

9 A I believe it was Mr. Morrill with -- I can't
0 remember the name of the firm.

1 Q And did you talk with Mr. Morrill?

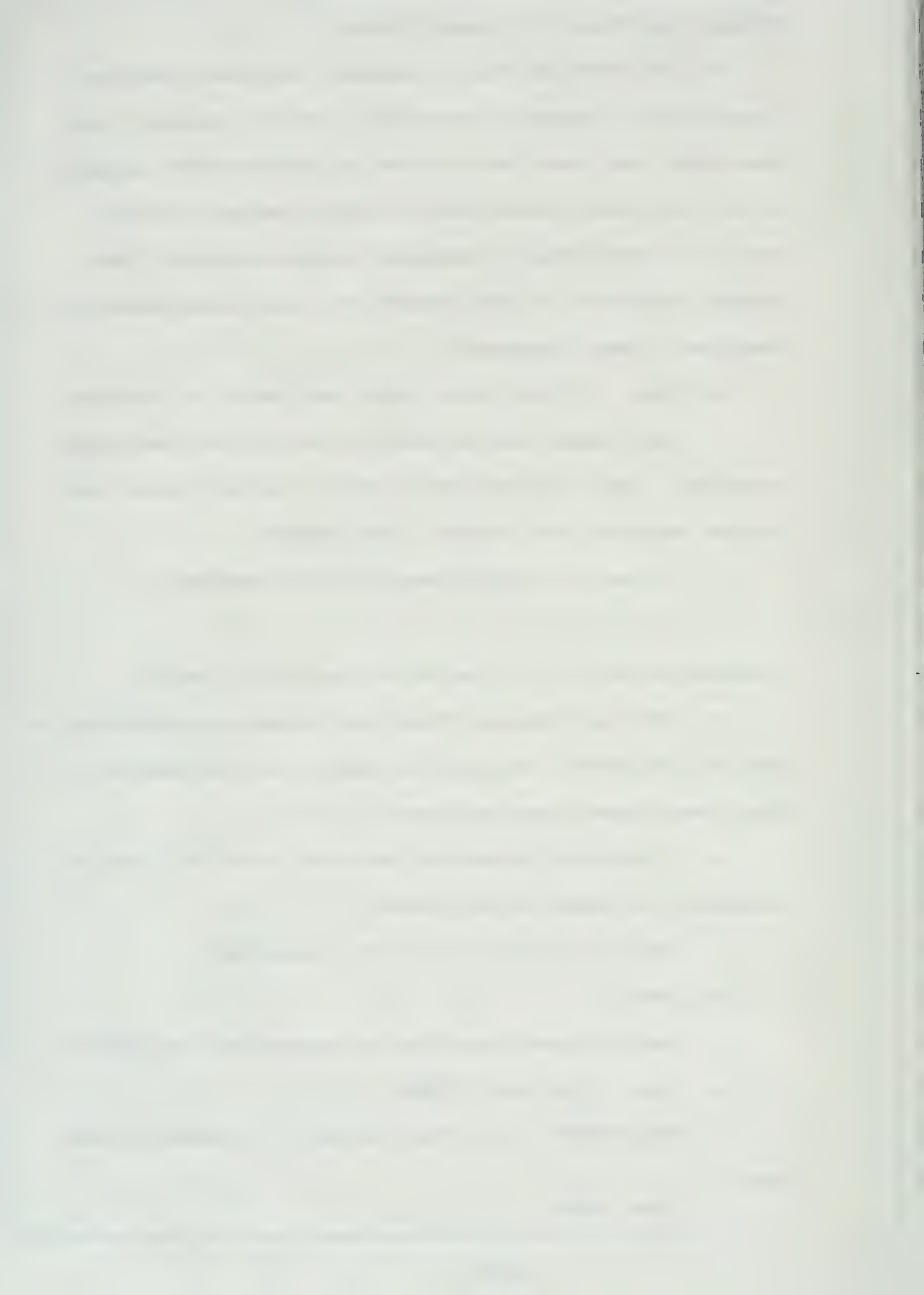
2 A Yes.

3 Q And did you describe the nature of the risk?

4 A Yes, I believe I did.

5 THE COURT: A little louder. I couldn't hear
6 you.

A Yes, sir.



1 BY MR. BRADLEY:

2 Q And what did you tell him?

3 A The best I could I described the job and what
4 the conditions were at the site, how far we were from
5 San Diego Harbor and what might happen.

6 Q Did you tell him anything about the tow?

7 A Perhaps. I don't recall. I can't recall.

8 Q Well, you did tell him that the barge was going
9 from Long Beach to Catalina and then down to Imperial
0 Beach, didn't you?

1 A Yes, I did.

2 Q And you asked him to obtain coverage for that
3 trip, didn't you?

4 A Yes. I believe the intent was that the barge
5 be covered for a certain period --

6 Q Which would encompass the trip?

7 A Well, as it turned out, it did. But as I recall,
8 the only thing that I was concerned about was the barge
9 at the jobsite." [Emphasis added.]

0
1 Transcript Page 101, Lines 12-15:

2 "A . . . earlier I explained I didn't expect to
3 be held liable for the barge in transit; I expected to
4 be held liable for it when it was delivered. . . ."

5
6 Transcript Page 107, Lines 4-12:

"Q And did you not advise your underwriters that Healy Tibbitts, during this period while it was using Barge 41 from Long Beach to Catalina to carry the load down to Imperial Beach to unload the rock and back to Long Beach was acting in effect as the owner of the barge with all of the responsibilities --

A No.

Q -- risk of loss and damage?

A No."

The transaction as originally conceived contemplated American towing the barge to the jobsite where Healy Tibbitts would take delivery.² American was going to hire Garvin Towboat for the tow and then bill Healy Tibbitts. However, because American intended to charge demurrage, the deal as finally arranged was that the cargo of rock was purchased F.O.B. Catalina. The only thing changed though, in Smith's mind, aside from eliminating demurrage, was that Garvin would bill Healy Tibbitts direct. Healy Tibbitts would still not get the barge until it came to the jobsite. During the tow Garvin would still have the possession of the barge. It was for this reason that Smith, when he issued Exhibit 2 which read "ship via . . . F.O.B. Catalina", considered delivery would be the same as before, namely at the job site and Healy

² Transcript Page 19, Lines 8-20.

1 Tibbitts would need insurance when the barge was delivered
2 at the job site.

3 Smith did not obtain insurance as part of an agreement
4 to return the barge in the same good order as when received.
5 He obtained insurance as a matter of business prudence to
6 insure against the negligence of his employees when they had
7 exclusive custody of the barge at the job site. The insurance
8 of Healy Tibbitts was for a period since it was unknown just
9 when and how long the barge would be at the job site and there
0 was no difference in the premium. All of this is entirely
1 consistent with Finding No. 6.

2 Third, after the casualty the underwriters arranged
3 for a survey, which is the common practice. Never has attend-
4 ance at a survey by an underwriter's representative been
5 deemed an admission of the liability of the underwriter's
6 assured. The practice is for all parties to be present at a
7 survey³ and the reason is to determine the damages, not the
8 liability. Attendance at the survey is not inconsistent with
9 Finding No. 6.

0 Fourth, bids were addressed to Healy Tibbitts and the
1 bill for repairs was sent to Healy Tibbitts. However, Healy

2
3 ³ American's underwriter also had a representative present at the
4 survey. American's Brief Page 4, Line 21, last paragraph;
5 American's Libel Page 4, Lines 29-30; Transcript Pages 52-53;
6 Transcript Pages 29-30.

1 Tibbitts had nothing to do with obtaining bids, effecting the
2 repairs, or paying the bill. It is just as easy to argue that
3 since American authorized the repairs and paid the bill⁴,
4 that it considered itself liable for the damage.

5 Smith testified in this respect:

6 Transcript Page 118, Line 2 through Page 119, Line 8:

7 Q Mr. Smith, when you were cross examined by Mr.
8 Bradley, he showed you some bids that were addressed
9 to Healy Tibbitts. Did you initiate those bids?

0 A I did not.

1 Q All right. Do you know who initiated those
2 bids?

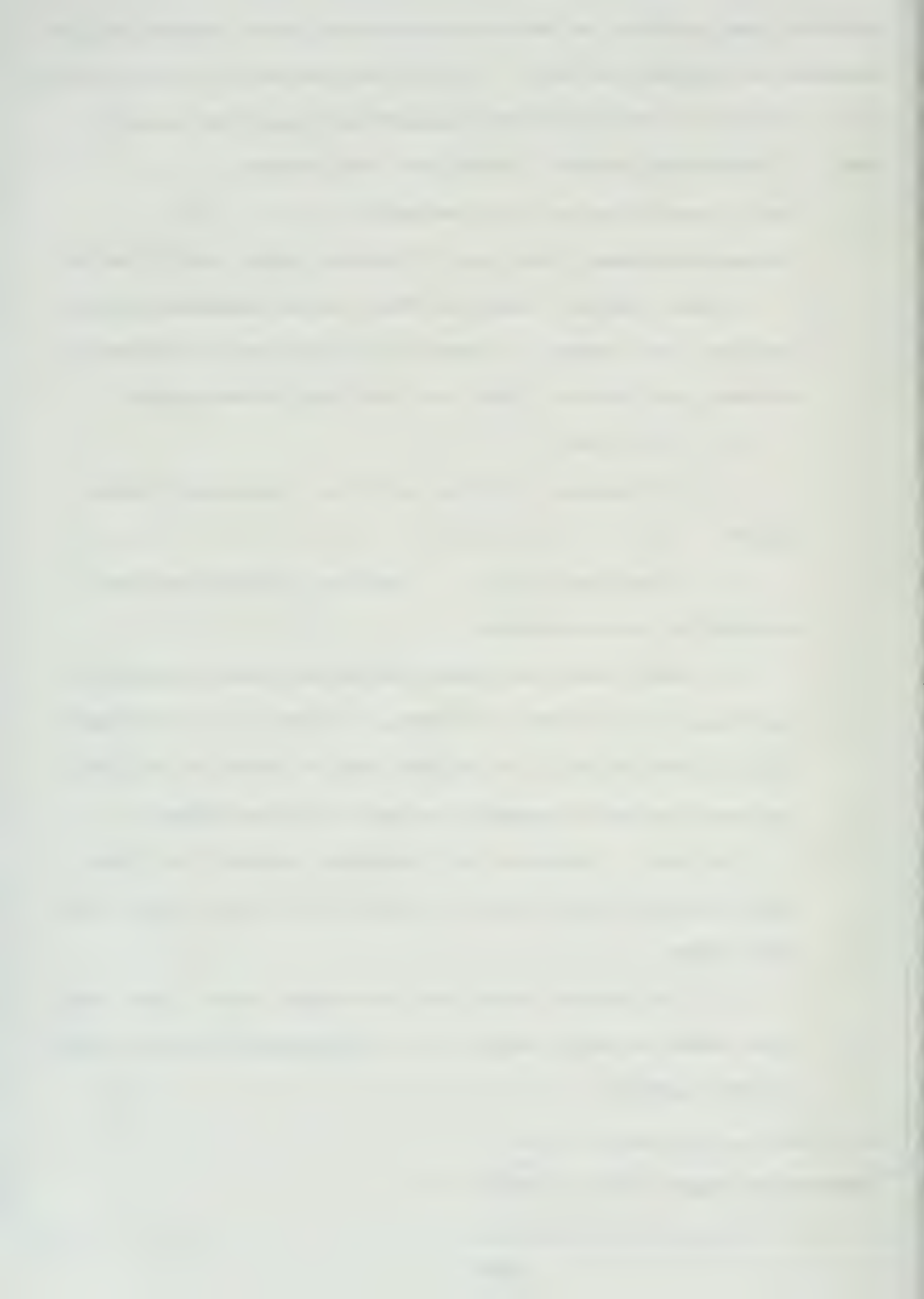
3 A I believe the U. S. Salvage did through Mr.
4 Morrill's instructions.

5 Q Now, when you received these bids, did you do
6 anything with respect to them, I mean did you accept
7 any of them or did you reject any of them or did you
8 do anything with respect to any of those bids?

9 A No. I believe Mr. Kornegay opened the bids,
0 read them and put them in a brief case and walked off
1 with them.

2 Q The people that did the repair work, did they
3 ever deal directly with you in arranging for the repair
4 of the barge?

5
6 ⁴ Transcript Pages 30-31; Exhibit 5.



1 A Not to my knowledge

2 Q Well, they didn't call you and say, 'Shall we
3 go ahead with it,' did they?

4 A No, Sir.

5 Q Otherwise, in effect you had nothing to do with
6 these bids, did you?

7 A That is correct, nothing to do with them."

8
9 Fifth, after the casualty Healy Tibbitts's purchase
0 order was modified to read F.O.B. job site. However, that was
1 done since Dunn insisted to Smith that under the present
2 arrangement Smith was liable for the barge damage. Smith
3 wanted to continue with the job and not argue at that point
4 over responsibility for the casualty. Smith testified as
5 follows:

6 Transcript Page 101, Lines 24-25:

7 "Since there was no extra cost either way, there
8 was no harm in doing it that way, and it certainly
9 saved arguments."

0
1 Transcript Page 100, Lines 23-24:

2 "At the moment my interest was to finish the
3 job and not argue with anybody about damages to
4 barges."

5 So the purchase order was changed. But even as changed, it
6 does not contain the alleged promise to return the barge in the

1 same good order and condition as when received. See Exhibit
2 14. Certainly, if American expected that as a term, it would
3 have inserted it in the modified agreement. Changing the
4 written contract insofar as place of delivery is concerned,
5 gives rise to no rule of construction imparting to the un-
6 changed agreement the alleged promise. Both the original and
7 the modified agreement are consistent with Finding No. 6.

8 In short, all the independent evidence, especially
9 the written contract of the parties, is consistent with Smith's
0 testimony and Finding No. 6, which therefore must be upheld.

1 However, even if Healy Tibbitts had promised to
2 return the barge in the same good order and condition as when
3 received, this would not enlarge Healy Tibbitts's liability
4 as a charterer. Healy Tibbitts would still only be liable
5 for negligence. There can be no doubt Healy Tibbitts was not
6 negligent. See Finding No. 13.

7 Mulvaney v. King Paint Mfg. Co., 256 F. 612 (2nd Cir.
8 1919);

9 Chase v. Morrell, 25 F. Supp. 904 (S.D.N.Y. 1938);

0 J. M. Brown, Inc. v. W. P. Fuller & Co., 28 C.A.
1 676 (1915);

2 Reconstruction Finance Corp. v. Peterson Bros.,
3 160 F. 2d 124 (5th Cir. 1947);

4 Harrison Brothers Drydock & Repair Yard, Inc. v.
5 Atkins, 193 F. Supp. 386 (S.D. Ala. 1961);

6 Venice v. Frazier Davis Const. Co., 87 F. Supp. 475

Healy Tibbitts places heavy reliance on the Mulvaney v. King Paint Mfg. Co., case where it was specifically held that a promise to return an item in the same condition as when received did not enlarge the liability of the promisor beyond the normal liability for damages due to negligence.

In Warren & Arthur Smadbeck v. Heling Contracting Corp., 50 F. 2d 99 (2nd Cir. 1931), a charter party case, the court stated:

"There is some evidence in the record that the parties discussed the insurance on the dredge, and, although contradicted by the appellee's witness, it was testified that the appellee agreed to insure the vessel against fire loss." At 101.

Respecting this point the court held:

"There is no clause in the charter which holds the charterer liable as an insurer against fire, and no provision should be read into it reaching that result unless it be stated clearly and in unambiguous language. Whenever a charterer has been held responsible, it has appeared that he has promised to return the barge in the same condition as received with the usual wear and tear expected and has failed to show that his care of the vessel excuses him. . . ."

At 100.

Under this line of cases American could not recover even if Finding No. 6 were set aside.

Conclusion

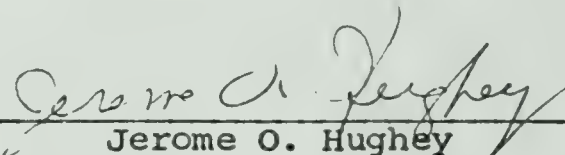
The law is consistent with the court's opinion and findings. A charterer is not absolutely liable for damage to the chartered vessel but is only liable for negligence. Here there was no negligence proven and there was no promise in the charter upon which Healy Tibbitts could be found liable. Finding No. 6 was based on conflicting oral testimony. It is supported by the written contract. The independent evidence is consistent with the credited oral testimony of Mr. Smith. The finding is not "clearly erroneous". The judgment should be affirmed.

Dated: October 18, 1966.

Respectfully submitted,

OVERTON, LYMAN & PRINCE

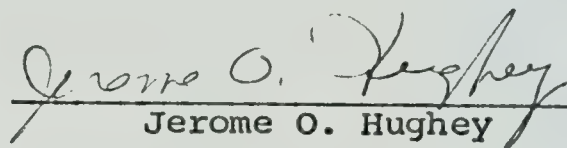
By



Jerome O. Hughey
Attorneys for Appellee

1
2 CERTIFICATE
3

4 I certify that in connection with the preparation
5 of this brief I have examined Rules 18 and 19 of the United
6 States Court of Appeals for the Ninth Circuit and that, in
7 my opinion, the foregoing brief is in full compliance with
8 those rules.
9

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2 Jerome O. Hughey
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No. 21149

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

AMERICAN CEMENT CORPORATION,

Appellant,

vs.

HEALY TIBBITTS CONSTRUCTION COMPANY,

Appellee.

Upon Appeal from the United States District Court,
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF

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Jeffries Banknote Company, Los Angeles

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APPELLANT'S REPLY BRIEF

Appellee's brief is not a satisfactory answer to appellant's opening brief. Appellee attempts to rationalize with illogical explanations some of Healy Tibbitts' acts and the written record and completely ignores other undisputed evidence compelling the conclusion that Healy Tibbitts by contractual undertaking had the risk of damage to Barge No. 41 when the accident occurred. The untenable position in which appellee finds itself is set forth below.

HEALY TIBBITTS' REPORT OF THE ACCIDENT TO ITS UNDERWRITERS

The inescapable fact is that Healy Tibbitts, having obtained hull insurance on Barge No. 41 which provided the well-known perils of the sea or act of God type of coverage,¹ reported the accident to its broker or insurance company and requested their help.² Further, the accident occurred during the period that the written record of Healy Tibbitts' insurance broker states that Healy Tibbitts had the risk of Barge No. 41.³ The specified period of risk coincides with the times Tug GARVIN picked up and returned Barge No. 41 to its berth at Long Beach or the period Healy Tibbitts had Barge No. 41 under charter.

Since the accident occurred while the Barge was under tow by Tug GARVIN en route to Healy Tibbitts' job site⁴ and Healy Tibbitts' personnel had not been near Barge No. 41, there was no conceivable way in which Healy Tibbitts could be involved unless Healy Tibbitts had agreed to assume throughout the charter period the risk of damage to the Barge. Healy Tibbitts' actions following the accident can be explained only on the basis that Healy Tibbitts knew it had agreed or committed itself to American to assume the risk of damage to the Barge. Businessmen simply do not make reports and ask their insurance company for help unless the company is potentially involved. In this instance, the only possible involvement of Healy Tibbitts and its insurance company

¹ R.Tr. 96-100, 119, Exh. 16.

² R.Tr. 103-4.

³ Exh. 16.

⁴ Finding No. 8.

was on the basis that Healy Tibbitts had previously agreed and, in fact, had the risk of damage to the Barge when the accident occurred.

HEALY TIBBITTS' INSURANCE BROKER'S REPORT TO ITS UNDERWRITERS

While appellee's brief attempts at length to rationalize Healy Tibbitts obtaining insurance on Barge No. 41 and states the insurance was for a period "since it was unknown just when and how long the Barge would be at the job site and there was no difference in the insurance premium",⁵ appellee ignores the fact that Healy Tibbitts' insurance broker or representative Marsh, McLennan-Cosgrove & Co. by letter of April 1, 1964 (the accident occurred the morning of January 7, 1964) advised Healy Tibbitts' underwriters that the underwriters earned \$100.00 premium for Barge No. 41 being at the risk of Healy Tibbitts for the period January 6, 1964 - 0200 to January 8, 1964 - 0830.⁶ Obviously, Marsh, McLennan had to be given the foregoing information by Healy Tibbitts. It is apparent that Healy Tibbitts told Marsh, McLennan that it had the risk not only at the job site but from the beginning to the end of the charter period. Certainly Healy Tibbitts would know exactly when Barge No. 41 was at the job site and if its assumption of risk was limited to the job site, it would not have given Marsh, McLennan the times Tug GARVIN picked up and returned the Barge to Long Beach as the period of risk.

⁵ Appellee's Reply Brief, Page 15.

⁶ Exh. 16.

In this particular instance the accident occurred before the Barge even reached the job site and Tug GARVIN returned the Barge to Long Beach as soon as it had the situation under control. Consequently, if Healy Tibbitts did not have the risk until the Barge was at the job site as Healy Tibbitts now asserts, Healy Tibbitts would not have advised its insurance broker that it had the risk of Barge No. 41 for the full charter period and certainly would not have committed itself to pay a \$100.00 premium for a risk which never attached. Businessmen simply do not report to their underwriters risks that do not exist or voluntarily commit their company to pay \$100.00 premiums for nothing.

THE SURVEY AND INVITATION TO BID

If Healy Tibbitts was not involved in the Barge accident by virtue of a contractual undertaking to assume the risk at the time of the accident, there is no rational explanation for the actions of Healy Tibbitts' underwriters following up on the report of accident by Healy Tibbitts. Contrary to appellee, it is not common practice for underwriters to arrange for a survey and prepare specifications for repairs to property unless they have some potential interest in the property. And certainly underwriters do not solicit bids be sent to their assured unless their assured has some obligation to repair the damages sustained. Yet, appellee argues that Healy Tibbitts' underwriters surveyed and invited bids without any conceivable interest in Barge No. 41.⁷ American, of course, attended the survey and reviewed the specifications prepared by Healy Tibbitts'

⁷Appellee's Reply Brief, Pages 15-16.

representatives because, as owner, American had an interest in the repairs which would be made. On the other hand, Healy Tibbitts and its underwriters could have no conceivable interest in surveying or repairing Barge No. 41 unless by contract Healy Tibbitts had assumed the risk of damage when the accident occurred.

THE WRITTEN RECORD

There were six documents admitted into evidence which could be considered as relating to the issue of Healy Tibbitts' assumption of risk, namely:

(1) The purchase order dated January 6, 1964;⁸

(2) The January 6, 1964 purchase order as modified by Mr. Smith following the accident;⁹

(3) The United States Salvage Association report;¹⁰

(4) Bids submitted for repairing the Barge;¹¹

(5) Long Beach Marine Repair Company invoice for barge repairs;¹² and

(6) Healy Tibbitts' insurance broker's letter of April 1, 1964.¹³

All the documents, with the exception of the Long Beach Marine invoice, were prepared by Healy Tibbitts

⁸ Exh. 2.

⁹ Exh. 14.

¹⁰ Exh. 10.

¹¹ Exh. 15.

¹² Exh. 5.

¹³ Exh. 16.

or in behalf of Healy Tibbitts by its agents or representatives, or in the case of the bids, were prepared by third parties at the request of Healy Tibbitts' underwriters' representative, United States Salvage Association.

As discussed above, the United States Salvage Association report, the solicitation and tender of bids and Healy Tibbitts' insurance broker's April 1, 1964 letter are logical and consistent only with Healy Tibbitts having the risk of damage to the Barge when the accident occurred. The Long Beach Marine invoice was addressed to American because after soliciting bids and ascertaining the cost of repairs, Healy Tibbitts refused to proceed and American was obliged to instruct Long Beach Marine to make the repairs in order that American could return its barge to use.

The purchase order of January 6, 1964, patently is a mere confirmation of sale prices intended for accounting or billing purposes. Appellee argues that the purchase order is the complete agreement for chartering Barge No. 41.¹⁴ In fact, the purchase order bears no resemblance whatsoever to a charter party which would be signed by both parties and would contain at the minimum the time when the charter commenced and terminated, where the Barge was to be delivered to charterer and redelivered to owner and also usually would contain provisions as to the condition in which the barge was to be delivered and returned, a prohibition against liens, charterer's promise to indemnify owner against liability, claims, penalties or fines in connection with the operation of the barge by charterer unless

¹⁴ Appellee's Reply Brief, Page 5.

caused by the negligence of owner, detailed provisions as to insurance coverage and who was to obtain the insurance and pay the premiums, a limitation as to the use to which the barge could be placed by charterer, a prohibition against assignment or subchartering, and perhaps a reference to applicable law and to arbitration.

It is obvious that the purchase order does not come close to a complete agreement or charter party and it is specious for appellee to assert that the purchase order was the entire agreement. The fact that Mr. Smith would testify that the purchase order constituted the entire agreement¹⁵ raises a serious doubt as to whether, at the time of trial, Mr. Smith recalled the details of the transaction or the negotiations and the agreement he reached with Mr. Dunn. Certainly, if a charter agreement had been prepared embodying customary provisions but neglecting to specify the condition in which the barge was to be returned to owner, the absence of such provision would carry considerable weight as appellee argues, but not in this situation. Further, the change in the purchase order following the accident by Mr. Smith does imply an admission that Healy Tibbitts had the risk when the accident occurred. Appellee has attempted to rationalize the change on the basis that it avoided an argument¹⁶ but such explanation is wanting in substance and particularly so in view of the fact that Mr. Smith testified that Healy Tibbitts' responsibility for the barge commenced as soon as the F.O.B. transaction occurred¹⁷ and Healy Tibbitts' original purchase order

¹⁵R.Tr. 84-6.

¹⁶Appellee's Reply Brief, Page 17.

¹⁷R.Tr. 87-8.

which was in effect when the accident occurred, clearly provides for a F.O.B. Catalina transaction¹⁸ which, in fact, occurred well before the accident happened.

Therefore, there is a series of four documents,¹⁹ none of which were prepared by American, which are consistent with Healy Tibbitts having the risk when the accident occurred, and no implication one way or the other may be drawn from the original purchase order²⁰ or the Long Beach Marine invoice for barge repairs.²¹

THE LAW

Appellee cites *Mulvaney vs. King Paint Manufacturing Company*, 256 Fed. 612 (2nd Cir. 1919) and other cases²² for the proposition that even if Healy Tibbitts had promised to return the barge in the same good order and condition as when received, Healy Tibbitts would still only be liable for negligence. More recent cases have brought the meaning of the phrase "return in the same good order and condition as when received" in line with the plain meaning of the words and have required that the charterer do precisely what the words say.

Ross vs. Moran Towing & Transportation Co.,
55 F.2d 1052 (2nd Cir. 1952); cert. den. 287
U.S. 608;

¹⁸Exh. 2.

¹⁹Exhs. 10, 14, 15 and 16.

²⁰Exh. 2.

²¹Exh. 5.

²²Appellee's Reply Brief, Page 18.

Metropolitan Sand & Gravel Corp. vs. The Dwyer
No. 25, 130 F. Supp. 172 (S.D.N.Y. 1954);

Baldwin vs. New York Cent. R. Co., 87 F. Supp.
562 (E.D.N.Y. 1949);

The Zeller No. 14, 74 F. Supp. 538 (E.D.N.Y.
1947).

Moreover, the discussions between Mr. Dunn and Mr. Smith clearly contemplated that Healy Tibbitts would assume the risk of damage to the barge or have an insurer's position²³ and the written record, namely the April 1, 1964 letter of Healy Tibbitts' insurance broker, confirms that Healy Tibbitts had such risk throughout the term of the charter.²⁴

²³R.Tr. 20-1, 92-101.

²⁴Exh. 16.

CONCLUSION

On an objective analysis of the evidence, both documentary and oral, the inevitable conclusion is that Healy Tibbitts had agreed to assume the risk of damage to Barge No. 41 when the accident occurred. Undisputed facts and the written record render the credibility of Mr. Smith's oral denial of responsibility extremely doubtful especially in view of his admission that Healy Tibbitts assumed the responsibility as soon as the F.O.B. transaction occurred which, in fact, took place at Catalina before the accident. The findings should be modified to provide that Healy Tibbitts did assume the risk of damage to the barge and to the findings, conclusions and decree there should be added provisions entitling American to recover from Healy Tibbitts \$8,404.00 with interest at the rate of 6% from and after January 31, 1964.

Respectfully submitted,

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Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

LAWRENCE D. BRADLEY, JR.

NO. 21153✓

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS SANDERS, et al.,
Appellants,

vs.

JOHN ERRECA, et al.,
Appellees.

FILED

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APPELLANTS' OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
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CENTRAL DIVISION

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LOUIS SANDERS, et al.,

Appellants,

vs.

JOHN ERRECA, et al.,

Appellees.

APPELLANTS' OPENING BRIEF

INTRODUCTORY STATEMENT

The case at bench is an action for damages brought individually against members of the California Highway Commission, the Director of the California Department of Public Works, and a Senior Right of Way Agent of the California Division of Highways.

Appellants herein, Plaintiffs below, have brought their action in the U. S. District Court to secure redress for deprivation of Appellants' property rights protected by the U. S. Constitution. Such rights of the Appellants were impaired when the Defendants, acting under color of their office, engaged in a course of action whereby the Appellants were forced to discontinue construction of a new shopping center, purportedly because the California Depart-

ment of Public Works was about to take Appellants' land for a freeway. In fact, no taking such as described to Appellants was ever intended or ever took place. The taking, when it came a year later under the prod of this action, proved to be substantially different. By reason of the misrepresentation as to the nature of the taking, threats by Appellees, and the delay, Appellants unnecessarily suffered massive damages.

JURISDICTIONAL STATEMENT

This Court's jurisdiction of the instant appeal is based on 28 U.S.C. §1291 and 28 U.S.C. §1294.

The jurisdiction of the District Court comes from 28 U.S.C. §1331 and 28 U.S.C. §1343.

STATEMENT OF THE CASE

The factual allegations contained in the Amended Complaint herein (CT 29) 1/ are briefly as follows:

The Appellants herein, Plaintiffs below, are the owners of a parcel of land of about 4.78 acres located within the city limits of Los Angeles, in the San Fernando Valley. The property has in the past been used as a shopping center.

Appellants have commenced a project whereby the subject

1/ CT designates Clerk's Transcript; RT the Reporter's Transcript.

property would be converted into a new, modern and larger shopping center. To this end Appellants subdivided, obtained the necessary bonds and permits, and employed the services of architects, engineers, contractors, lawyers and surveyors for the purpose of planning, designing and constructing the new shopping center. Tenants for the new shopping center were obtained, including Crocker Citizens National Bank, and leases signed. Old tenants moved out to make way for the construction.

In March 1965, after all of that was done at the cost of tens of thousands of dollars, and contracts were let, additional liabilities incurred and construction started, Appellants were contacted by Appellee Pierson Pedley, a Senior Right of Way Agent for the California Division of Highways. Pedley informed Appellants that their property was about to be taken by eminent domain for a freeway. Pedley stated that if Appellants did not cease construction of their new shopping center, the State of California would immediately start litigation and force Appellants to stop construction. In fact, the State could not then bring any action as no condemnation resolution had been passed, which Pedley knew, but this was unknown to Appellants.

In May 1965, Appellees Bradford, Guthrie, Houghteling, Woolley, Whitehurst, Kofman and Payne, members of the California Highway Commission, passed condemnation Resolution No. C-7011 purporting to authorize the condemnation of all the subject property. In fact, notwithstanding such resolution, Appellee Erreca, Director of the Department of Public Works, failed to

cause any condemnation proceedings to be undertaken.

In January 1966, after almost a year had passed since the initial interference by Pedley with the Appellants' shopping center construction, and no condemnation had occurred nor any bona fide steps taken to acquire the subject property by purchase, Appellants brought the instant action in the U. S. District Court, Southern District of California, Central Division, seeking damages from the Appellees for the above described interference with Appellants' use and enjoyment of their property.

Appellees moved to dismiss the action (CT 9). The motion was heard on February 28, 1966, before the Honorable Charles H. Carr, U. S. District Judge, who granted the motion (RT 35), and made and entered an order (CT 97) dismissing the action.

Thereafter, Appellants moved for a new trial (CT 100) on the grounds of newly discovered evidence consisting of the passage of a new condemnation resolution substantially reducing the area of taking of the subject property, and of admission by means of a signed, published statement of Appellee Houghteling that Appellees do not in fact exercise any discretionary functions as to passage of condemnation resolutions. The motion for a new trial was denied (CT 198).

This appeal from the dismissal of the action in the District Court followed.

QUESTIONS PRESENTED

1. Are Federal Courts powerless to entertain law-suits for violation of the Plaintiffs' Federal Constitutional rights, against a state official or employee individually, regardless of the merits of the case?

2. Where a defendant state official or employee claims immunity from suit in Federal Court, on the grounds that his acts complained of are claimed to be within his discretion, can such claim of immunity be sustained without any inquiry as to whether or not such acts are in fact discretionary?

3. Where state officials exact from a property owner a cessation of lawful construction of a shopping center by fraudulent threats of litigation and false promises of cooperation if construction is ceased, and where the owner as a result of the threats and in reliance on the promises ceases such construction and suffers severe economic damages thereby, has the owner been deprived of his property rights secured by the Constitution, within the meaning of 42 U.S.C. §1983?

SPECIFICATION OF ERRORS

The District Court erred in that :

1. It held (CT 98) that the Defendants herein are immune from lawsuit in Federal Courts merely by virtue of their status as officials or employees of the State of California.

2. It found that the defendants herein were acting within the scope of their discretion when they committed the acts complained of, although there has been neither evidence nor any other showing as to what the defendants' functions are or what is the discretion involved therein, if any. Indeed, there was a showing, upon Motion for New Trial (CT 100) by the written admission of one of the defendants, that defendants Bradford, Guthrie, Houghteling, Woolley, Whitehurst, Kofman and Payne in fact exercise no discretionary function as to adoption of condemnation resolutions.

3. It based its denial of relief to Appellants on the basis that the Fourteenth Amendment and the Civil Rights Act (42 U.S.C. §1983) afford relief only to Negroes and no one else (see RT 14, 32).

4. It found (CT 98) that the acts complained of and the damages caused thereby do not constitute a taking or damaging of property within the protection afforded by the United States Constitution. The correct test of applicability of the Fourteenth Amendment is whether there has been a deprivation of a property right without due process of law.

I

INTRODUCTION

"The King, moreover," - said Blackstone - "is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness." (Blackstone, Commentaries, 246 [17th edition, 1830]; emphasis Blackstone's).

The Defendants are a Right of Way Agent and Highway Commissioners, not Kings. It is at best doubtful if Blackstone's view prevails even in the Constitutional Monarchy now extant in the nation in which he wrote. In days when some clergy dare question God's divinity, it seems anachronistic to urge that a highway agent has inherited the divine right of Henry VIII. 2/

The Defendants, unlike Blackstone's idealized King, can and have done wrong - they have wrongfully interfered with Appellants' property rights to Appellants' damage. The instant case seeks to determine, on the merits, the extent of the damages inflicted on Appellants.

But, it has been the assertion of the Appellees in the court below that they are immune from the exercise of the judicial power of the United States, because they are state officials and employees.

2/ "Possibly it was during Tudor despotism when much nonsense about the immaculate king of transcendental prerogatives and goodness was purveyed." Borchard, 36 Yale L. J. 31.

In other words, appellees seek to arrogate to themselves the kind of absolute immunity from judicial review as was once possessed by absolute monarchs, and is today possessed only by some sovereign states. 3/

It is most important to emphasize at this point that what the Appellees seek to accomplish in the case at bench, is the establishment of a privileged class - state government employees - who cannot be held accountable for their acts, and whose misdeeds, no matter how wrongful and damaging, are beyond the reach of our judicial system. This, we submit is the most crucial issue raised by the instant case.

The supreme law of the land is the United States Constitution. It is expressly decreed to be such by its language (Article VI, clause 2). But if state employees can violate the rights secured by the Constitution and then escape accountability for such violations, not on the merits, but merely because they are state employees, then the will of state employees becomes "the supreme law of the land", and not the Constitution.

Such a conclusion is intolerable. Such doctrine has been repeatedly and consistently rejected by the U. S. Supreme Court and other Federal Courts. We ask this Court to reject it again. To borrow an expression of Mr. Justice Brandeis: against that pernicious doctrine this court should resolutely set its face.

3/ In this connection please note that the State of California no longer enjoys immunity from lawsuit in the State courts. See p. 10, *infra*.

II

EMPLOYMENT BY THE STATE GOVERNMENT DOES NOT RENDER ONE IMMUNE TO THE JUDICIAL POWER OF THE UNITED STATES.

The essence of the Appellees' argument is that notwithstanding the provisions of Article III, §§ 1 and 2, of the United States Constitution, establishing the judicial power of the United States, the Appellees are somehow totally beyond the reach of the Federal Courts. This result the Appellees seek to achieve solely by virtue of the fact that they are employees or officials of a state.

The above arguments by the Appellees are devoid of merit.

The only conceivable way in which such an immunity argument can be made, is that the immunity is somehow bestowed by the state upon its employees, for it cannot be contended that the Appellees are inherently immune; the immunity must spring from the state-defendant relationship.

The theory that a state may bestow immunity falls apart when subjected to legal analysis for two reasons. First, as shown below, the State of California itself possesses no immunity from lawsuit. Second, even in the old days, when California did possess immunity from lawsuit, such immunity did not extend to state employees. A fortiori, no such immunity of employees can exist now when the state from whom the employees would have to derive their immunity itself possesses none. Finally, assuming arguendo that the state does confer some form of immunity or privilege upon its employees in the state courts - which in fact is not the case - such a state-conferred immunity vanishes in the

face of the judicial power of the United States.

The above points are more fully discussed below.

A. California State Officials Lack Immunity
 From Lawsuit Even Under State Law.

Article XX, §6 of the California Constitution provides that the state is subject to lawsuit. In Muskopf v. Corning Hospital District (1961), 55 Cal.2d 211, 359 P.2d 457, the California Supreme Court construed the above provision of the State Constitution so as to abolish state immunity from lawsuit. In a companion case to Muskopf (Lipman v. Brisbane Elementary School District [1961], 55 Cal.2d 224, 234, 359 P.2d 465), the California Supreme Court held that state officials are amenable to lawsuit when they engage in tortious conduct.

The latter case, of course, merely reiterated long-standing California law:

"The civil liability of an officer committing a tort appears to be exactly the same as that of a civilian." Silva v. MacAuley (1933), 135 Cal.App. 249, 257, 26 P.2d 887, Petition for hearing denied by Supreme Court.

Also see: Wolfsen v. Wheeler (1933), 130 Cal.App. 475, 19 P.2d 1004.

" 'Generally, the applicable rule is that an action against state officers, . . . [to] obtain relief from an alleged invalid act or abuse of authority by

them is not ordinarily a suit against the state, and is not prohibited as such under the general principles governing the immunity of the state from suit. That is true because acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state. (Citations)' "Ahlgren v. Carr (1962), 209 Cal. App. 2d 248, 254-255.

We cite the above law to demonstrate that even under Appellees' theory they enjoy no immunity from lawsuit. For such a claimed immunity could only exist as derivative from the state, and it is clear from the above that neither the State of California itself, nor its employees are protected by state law from accountability before the courts for their individual wrongs. In short, Appellees cannot acquire from the state something which the state itself does not possess.

B. The State Lacks Power to Immunize Its
 Employees From the Judicial Power of
 The United States.

Even if one could arguendo disregard the law that state employees cannot derive any immunity from their connection with the State of California, and somehow assume that the state does confer such immunity, the state employees would still be liable in actions brought in federal courts. By reason of the federal sup-

remacy clause of the Constitution (Article VI) the State simply lacks the power to immunize its employees from the application of the judicial power of the United States. As this Court recently put it:

"Whether there is 'color' of state law is a federal and not a state question. Were this not true a state acting through its legislature or courts, would have within its power to immunize its agencies and officials from liability under the Civil Rights Act." Marshall v. Sawyer (1962), 301 F.2d 639, 646.

The same conclusion was reached by the U. S. Court of Appeals, Third Circuit, in Picking v. Pennsylvania R. R. Co. (1945), 151 F.2d 240, cert. denied 332 U.S. 776, rehearing denied 332 U.S. 821:

"Obviously if a state statute purports to confer immunity upon an official of a state who has violated the provisions of the Third Civil Rights Act by depriving an individual of a federal right, the state has invaded the liberties of the individual which are projected by the 14th Amendment." (151 F.2d at 251-252).

Likewise the U. S. Supreme Court:

"It is immaterial whether respondents' conduct is legal or illegal as a matter of state law. Monroe v. Pape, supra, (365 U.S. at 171-187). Such claims are

entitled to be adjudicated in federal courts. (Citations). "
McNeese v. Board of Education (1963), 373 U. S. 668, 674.

"It is familiar doctrine that the prohibition of
a federal statute may not be set at naught or its benefit
denied by state statutes or common law rules." Sola
Electric Co. v. Jefferson Electric Co. (1942), 317 U. S.
173, 176.

In short, any claim of personal immunity derivative from
the authority of a state, cannot bind or limit the judicial power of
the United States entrusted to the Federal Courts.

C. The United States Supreme Court Has
 On Many Occasions Rejected Claims Of
 Immunity By State Officials.

Starting with the first impression case (Osborn v. Bank of
the United States [1824], 9 Wheat. 738) the United States Supreme
Court has on over a score of occasions held that state officials
sued individually for their wrongful acts lack immunity and are
amenable to suit in Federal Courts.

The rationale of such U. S. Supreme Court holdings is two-
fold. First, a state is not a physical thing, it is a conceptual
abstraction. Therefore, a state can act only through individuals.
Hence, to lay a prohibition on certain state actions by means of the
Fourteenth Amendment, while allowing state officials to freely

transgress such prohibition, would be to render the Fourteenth Amendment and other portions of the U. S. Constitution limiting state powers, a collection of empty phrases.

" . . . in truth the [14th] Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the amendment. In other words, the amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs it prohibits, proceeds not merely upon the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also, conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result might be used as an instrument for doing wrongs, provided against all and every such possible contingency. " Home Telephone and Telegraph Co. v. Los Angeles (1913), 227 U.S. 278, 288.

"But the [14th] Constitutional Amendment was ordained for a purpose. It was to secure equal rights to all persons, and, to insure to all persons the enjoyment of such rights, power was given to Congress to enforce its provisions by appropriate legislation. Such legislation must act upon persons, not upon the abstract thing denominated or state, but upon the persons who are the agents of the State in the

denial of the rights which were intended to be secured. "

Ex parte Virginia (1880), 10 Otto 339.

The second basis of the Supreme Court's rationale in denying immunity springs directly from the federal supremacy clause of Article VI of the United States Constitution. That Article declares the U. S. Constitution to be the supreme law of the land. But if a state official can transgress the prohibitions contained in the Constitution and then avoid any judicial consequences of such violation on the grounds that he as a state official is immune from lawsuit, then, manifestly, the acts and will of such state official would be the supreme law of the land, and not the U. S. Constitution. Or, in the words of the Supreme Court:

" . . . appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the federal government.

"If this extreme position could be deemed to be well taken, it is manifest that the fiat of a state governor, and not the constitution of the United States, would be the supreme law of the land; that the restrictions of the federal constitution upon the exercise of state power would be but impotent phrases, the futility of which the state may at any time disclose by the simple process of

transferring powers of legislation to the governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the federal constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that constitution, the subject is necessarily one for judicial inquiry and appropriate proceeding directed against the individuals charged for the transgression. To such a case federal judicial power extends (Art. III, §2) and, so extending, the court has all the authority appropriate to its exercise."

Sterling v. Constantim (1932), 287 U.S. 378, 397-398.

The holdings of the U. S. Supreme Court squarely and consistently have supported the contentions of the Appellants herein - that state officials are not immune to lawsuits in federal courts, for their individual wrongs. Appellants desire to bring to this Court's attention the many U. S. Supreme Court cases and the explicit language employed by that Court in such cases. However, in order to preserve the continuity of this brief, and mindful of the provisions of Rule 18(e) of this Court, the quotations from the appropriate Supreme Court cases are contained in the Appendix hereto.

D. The Exceptional Privilege Granted to
Legislators Is Not Applicable to Other
State Officials, Such as Appellees Herein.

Appellees based their immunity arguments in the court below on a single case - Tenney v. Brandhove (1951), 341 U.S. 367. Tenney held that members of a state legislature engaged in "intra-legislative" activities, are privileged, and therefore not amenable to suit for violations of federal statutes. In Tenney the Supreme Court took great care to point out that the holding therein was limited to the facts of that particular case:

"We have only considered the scope of the privilege as applied to the facts of the present case. As Mr. Justice Miller said in the Kilbourn case: 'It is not necessary to decide here that there may not be things done, in the one house or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible.' 103 U.S. at 204. We conclude only that here the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct." 341 U.S. at 378-379.

Also see the concurring opinion of Mr. Justice Black stating:

"And today's decision indicates that there is a point at which a legislator's conduct so far exceeds the bounds of legislative power that he may be held personally

liable in a suit brought under the Civil Rights Act. "

341 U.S. 379.

In short, Tenney, referring strictly to state legislators engaged in legislative activities, establishes a legislative privilege, not absolute immunity from lawsuit. Indeed, Tenney clearly indicates that there is no absolute immunity even as to state legislators.

But in the case at bench, it is indisputably clear that the Appellees are not even legislators. They are employees or officials of the Department of Public Works of the State of California, a part of the executive branch of California. The Appellees' claims made in the court below, that they exercise "a legislative function" are patently without merit and fly in the face of the provisions of Article III, §1 of the California Constitution which states:

"The powers of the government of the State of California shall be divided into three separate departments - the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions of pertaining to either of the others, except as in this constitution expressly directed or permitted. "

In short, the Appellees are not legislators and can find no comfort in Tenney v. Brandhove.

Moreover, it has been expressly held by the U. S. Court of

Appeals, Seventh Circuit:

"The common law immunity of state legislators for their acts, recognized in Tenney v. Brandhove, 1951, 341 U.S. 367, 378-394, 71 S.Ct. 783, 95 L.Ed. 1019, does not extend to local officials. . . . " Progress Development Co. v. Mitchell (1961), 286 F.2d 222, 231.

E. Federal Courts Have Consistently Upheld The Right to Sue State Officials to Redress Interferences With Economic Rights of Individuals.

The very nature and purpose of 42 U.S.C. §1983 is to provide a broadly applicable method of recourse in federal courts against state officials acting under color of state law.

"If a statute is sufficiently clear to afford a court of equity a basis for inunctive relief it will sustain an action for damages. As we read RS §1979 in the light of the Screws decision we are compelled to the conclusion that Congress gave a right of action sounding in tort to every individual whose federal rights were trespassed upon by any officer acting under pretense of state law." Picking v. Pennsylvania Railroad Co. (1945), 151 F.2d 240, 249.

The breadth of remedies provided by 42 U.S.C. §1983 and the congressional intent to provide such remedies are readily seen

from the discussion of the background of that statute by the U. S. Supreme Court in Monroe v. Pape, 365 U.S. 167, 180:

"It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal court because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the 14th Amendment might be denied by the state agency. " (Emphasis added).

Likewise, 60 Northwestern U. L. R. 277, Constitutional Tort: Monroe v. Pape and the Frontiers Beyond, which after reviewing congressional arguments in favor and opposed to the passage of R.S. §1979 (42 U.S.C. §1983), states at page 281:

"The plentitude of power which it was thought the bill bestowed is perhaps best deduced from the outcries of its opponents. By their complaints, they, in effect, conceded the breadth of the legislation. "

and at page 282:

"It is obvious from the words spoken on both sides that the framers contemplated a bill of great scope. They wished to expand federal jurisdiction significantly as to offenses which generally had been considered 'local' ones. "

The leading case establishing the scope of 42 U.S.C. §1983

is Monroe v. Pape, supra. In Monroe, the U. S. Supreme Court carefully reviewed the background, scope and development of applicability of that statute. The net result of Monroe has been to render state employees accountable before the federal judiciary for their wrongs, as federal employees had been theretofore (Bell v. Hood [1946], 327 U.S. 678).

Notwithstanding the fact that Monroe arose in a context of interference by police officers with personal rights, it is obvious that 42 U.S.C. §1983 finds equal applicability in cases where property rights are interfered with. This is only proper and logical, for the Fourteenth Amendment to the U. S. Constitution protects property rights along with life and liberty in its due process clause.

Thus, one finds numerous instances where federal courts have invoked 42 U.S.C. §1983 to protect economic rights of citizens.

In Hornsby v. Allen (1964, C.A. 5th), 326 F.2d 605, the plaintiff brought an action against state officials, charging that she had been arbitrarily denied a liquor license. The U.S. District Court for the Northern District of Georgia dismissed the complaint. The Fifth Circuit Court reversed, holding that state officials are held to federal due process standards in their dealings with individual persons and cannot act arbitrarily to the injury of citizens with whom they deal.

"The public has the right to expect its officers to observe prescribed standards and to make adjudications on the basis of merit. The first step toward

insuring that these expectations are realized is to require adherence to the standards of due process; absolute and uncontrolled discretion invites abuse. (Citations). " 326 F. 2d at 610.

In McGuire v. Sadler (1964, C.A. 5th), 337 F. 2d 902, the Circuit Court reversed the dismissal of a complaint by the U. S. District Court for the Western District of Texas, wherein the plaintiff alleged that defendant state land commissioners were attempting, in bad faith, to sell land in which plaintiff claimed title. McGuire held that the plaintiff did state a cause of action. The case is particularly significant because it was decided on contractual theory, and is thus a clear example of federal courts protecting the economic right of individual citizens in an action against state officials.

In Corsican Productions v. Pitchess (1964, C.A. 9th), 338 F. 2d 441, the plaintiff brought action against the sheriff and prosecutors of Los Angeles County seeking to prevent them from interfering with the distribution of plaintiff's motion pictures. After the District Court dismissed the complaint, this Court reversed, indicating that state prosecutors are not immune to lawsuit in federal court by virtue of their status without regard to their conduct. (Likewise see Robichaud v. Ronan [1965, C.A. 9th], 351 F. 2d 533.)

Also in point is Marshal v. Sawyer (1962, C.A. 9th), 301 F. 2d 639, wherein the plaintiff alleged that defendant officials of

the State of Nevada, including the governor thereof, had arbitrarily "black listed" plaintiff and thereby denied him access to the gambling casinos of Nevada on equal terms with other members of the public. This Court held that plaintiff did indeed state a cause of action and was entitled to try his case on the merits in federal court. (Inasmuch as in Sawyer, the Governor of Nevada was one of the defendants, we submit that Sawyer alone effectively disposes of Appellees' argument herein, that they, as state officials, are immune to lawsuit in federal court.)

In Adams v. City of Parkridge (1961, C.A. 7th), 293 F.2d 585, the plaintiffs brought action after being barred by a local ordinance from soliciting funds for a particular charity. The District Court dismissed the complaint, and such dismissal was reversed by the Seventh Circuit. Here again, the federally protected economic rights of plaintiffs were protected by the federal court against interference by local governmental officials.

Also see Sheridan v. Williams (1964, C.A. 9th), 333 F.2d 581, wherein this Court held that a wrongful seizure of the plaintiff's property, and interference with plaintiff's rights in such property, are actionable in federal court.

In summary, the above cases clearly demonstrate that there is no such thing as one formalized, exclusive way of "taking" or "deprivation" of property, for which federal courts will grant relief. The above factual situations and decisions demonstrate that the federal courts properly look to the economic realities of each case and use as their criterion for relief, no doctrinaire

standard, not the fact that title to or possession of a piece of land has been taken by some government entity, but rather the fact that a person's economic interest in his property of whatever kind, has been impaired or destroyed by government officials. Such impairment or destruction is a deprivation within the contemplation of the Constitution. 4/

In the case at bar there have been precisely such wilful and arbitrary interferences with and destruction of Appellants' property rights, warranting relief.

Appellants wish to make it clear to the Court that they do not object (because they cannot) to a taking by eminent domain of Appellants' property by the State of California for a freeway. What Appellants do object to are the acts set forth in the Complaint whereby the Defendants have perverted the process of eminent domain, and used it as a club with which to destroy the Appellants' new shopping center and bully Appellants into submission by leaving Appellants dangling, so to speak, with no further action or attempt to implement the eminent domain taking of Appellants' property as promised and threatened, and without compensation for the havoc wreaked upon Appellants' property.

4/ This, of course, is consistent with the established principle that compensation is to indemnify the property owner:

" . . . the question is, what has the owner lost? not, What has the taker gained?" Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195.

F. State Officials Are Liable in Federal Courts For Abuse of the State's Power of Eminent Domain.

The power of eminent domain is but a single facet of the many governmental activities of a state. The state official who undertakes to engage in activities classified as in the nature of taking of private property for a public use is just as much subject to the proscriptions and limitations of the Federal Constitution as any other state official undertaking to conduct any other activity on behalf of the state. This is so on both reason and authority:

"Surely eminent domain is no more mystically involved with 'sovereign prerogative' than a state's power to regulate fishing in its waters (citation), its power to regulate intra state trucking rates (citation), a city's power to issue certain bonds without a referendum (citation), its power to license motor vehicles (citation), and a host of other governmental activities carried on by the states and their subdivisions. . . . " Allegheny County v. Frank Mashuda Co. (1959), 360 U.S. 185, 192.

The above words of the U. S. Supreme Court are but a restatement of the well settled rule that:

" . . . every state power is limited by the inhibitions of the 14th Amendment. (Citations). " Southern Railway Co. v. Virginia (1933), 290 U.S. 190, 196.

"That amendment [14th] governs any action of a state, 'whether through its legislature, through its courts, or through its executive or administrative officers.' (Citations)." Mooney v. Holohan (1935), 294 U.S. 103, 113.

Also see N. A. A. C. P. v. Alabama (1958), 357 U.S. 449.

It necessarily follows from the above that a state official who transgresses constitutional limitations and commits a wrong against another in the eminent domain context, is no more of a privileged personage in the eyes of the Federal Courts than any other state official transgressing any other law. It has expressly been so held.

In Progress Development Corp. v. Mitchell (1961), 286 F.2d 222, it was alleged by plaintiff property owners that a political subdivision of the State of Illinois proceeded to condemn the property owners' land, ostensibly for a park, but in fact to prevent the property owners from building a housing development in which homes were to be sold to persons of all races. The complaint in Mitchell sought injunctive relief and damages resulting from the above abuse of the power of eminent domain by the local officials. After the District Court dismissed the complaint and entered summary judgment for the defendants, the Circuit Court reversed, holding expressly (286 F.2d at 234) that the property owners in Mitchell were entitled to try their action for damages.

In the case at bench, the District Court sought to distinguish the Mitchell case as follows (RT p. 14, lines 6-10):

"THE COURT: Counsel, I glanced over that case. You have a wholly different problem. You have the problem of trying to prohibit the Negroes from coming in that neighborhood. Of course, any time that issue gets into any case, why, you know what the result will be. "

With all due respect to the District Court, Appellants submit that the lower court's view of the Mitchell case is erroneous. Appellants fail to see how the presence of any supposed racial considerations in the Mitchell case can possibly have a bearing on that case's precedential value. Indeed, the Circuit Court in Mitchell expressly rejected the attempts by the parties therein to inject the racial issue into the case (see 286 F. 2d at 234).

It would appear that the District Court herein erroneously injected into the case at bench a theory that the statutes relied on herein (28 U.S.C. §1331, 28 U.S.C. §1343, and 42 U.S.C. §1983) are somehow applicable only to racial minority groups and afford no relief in Federal Courts to other persons. Indeed, the District Court expressly so stated (RT p. 32, lines 2 et seq.). We set forth hereat the colloquy which took place between the District Court and Appellants' counsel, for it plainly demonstrates the unduly narrow view the court below took of the protection afforded by the U. S. Constitution to all persons:

"THE COURT: . . . I don't think this statute that you are relying on here is -- as a matter of fact,

this statute has already been stretched beyond all sanity. Anyone who reads the history of 1980 -- and you are basing yours on statute 1983?

"MR. KANNER: Yes, Your Honor.

"THE COURT: Anyone who reads that, who takes the time to read that, knows it was passed to protect because of race or color. It was passed during reconstruction times. It wasn't passed to cover these things at all. But the court has been broadening and rewriting all along, and I don't think it is up to me.

"MR. KANNER: Your Honor, so was the 14th Amendment.

"THE COURT: As a matter of fact the 14th Amendment was never approved. Did you know that? Never approved.

"MR. KANNER: May I make one statement?

"THE COURT: The Secretary of State, I guess it was, proscribed this proclamation. When it was in effect, both -- two Northern states, New Jersey, as I remember, and the other, Ohio, and one other state, at the first approving withdrew their approval. They did not have the required number of votes to approve the 14th Amendment, so it never actually became effective as a matter of law. But we have a habit, I guess, of skipping over things."

In short, Appellants came into the District Court to obtain protection for their rights secured by the Fourteenth Amendment, but instead of getting relief, were told by the District Court, in effect, that there is no Fourteenth Amendment, and even if there is one it was meant to protect Negroes and no one else.

With all due respect to the District Court such views are not the law. Appellants contend that the Fourteenth Amendment to the United States Constitution was and is effective. Appellants contend that the provisions of the Fourteenth Amendment are an effective restraint on all state actions, and protect all persons, regardless of the color of their skin.

III

THE DISTRICT COURT'S FINDING THAT APPELLEES EXERCISE A DISCRETIONARY FUNCTION IS UNSUPPORTED AND CONTRARY TO UNCONTROVERTED EVIDENCE

Accepting arguendo the Appellees' arguments that State officials acting within the scope of their discretion are immune from suit in Federal Court, no matter what the consequences of their acts, it becomes plain that before one can establish whether or not a particular official enjoys such immunity one must establish whether or not the official acted within his discretion. In other words, at the very threshold of the case one is confronted with the determination of what some writers have termed "jurisdictional facts", namely whether or not the Defendants - as a matter of fact - fall into the group whose immunity they seek.

The above principle was stated as follows by the Court of Appeals in Clackamas County v. McKay (1954), 219 F.2d 479, 495:

"Executive officers cannot under such circumstances create an aura of doubt and dispute which will be outside the established power of the judiciary to compel obedience to a clear mandate of the Congress. They cannot by bootstraps manufactured by them lift themselves out of the jurisdiction of the courts."

And the mere fact that a particular defendant official may under some circumstances exercise functions of a highly discretionary nature, does not compel the conclusion that such official's every act is discretionary, nor that the acts complained of in a particular case were within his discretion. The latter point is well illustrated by Udall etc. v. Wisconsin et al. (1962), 306 F.2d 790, 792-793. The Defendant therein, Mr. Stuart Udall, is the Secretary of the Interior - a member of the President's cabinet, subordinate only to the President of the United States. As such he possesses great discretionary powers. But the question is not whether a defendant has great discretionary powers, but whether he in fact exercised such powers in a particular case. In Udall, the Court of Appeals held that the particular functions of the Secretary of the Interior involved therein, were merely ministerial, and reviewed the acts of the Secretary. Likewise see Parish v. McVeagh (1909), 214 U.S. 124, holding certain acts of the Secretary of the Treasury to be ministerial.

But in the case at bench there has been no determination that the Appellees' acts complained of were in fact discretionary.

In this regard the following colloquy took place in the court below (RT 25, lines 20-25; 26, lines 1-4):

"MR. KANNER: I contend, Your Honor, that any state official with the recognized exception of legislators and judges, who acts beyond his capacity, even though under color of that capacity, and in so doing does an unconstitutional act, is stripped of his state clothes, so to speak, and he is a mere man standing before a court.

"THE COURT: Well, the trouble with that theory is that in every case there will be a trial as to what is the dividing line, and that is the reason of immunity to keep the public officials from being harassed."

The District Court, in effect, ruled that whenever a state official is served as a defendant he need only come into the District Court and say "I am a state official" and thereby automatically render the Federal judiciary impotent. Such a conclusion is obviously untenable, for it would render constitutional limitations upon the states and much Federal legislation so much idle chatter. What good constitutional pronouncements of principle, what good Federal laws enacted by the Congress, if in the end any state official may violate them all, and merely by virtue of being

a state official prevent any action by Federal Courts to whom is entrusted the administration of Federal law ?

Appellants' ultimate, basic contention is that the provisions of the Federal Constitution are not just words on an old parchment exhibited in the National Archives for the indoctrination of visiting school children. The Constitution has a meaning and vitality which express themselves in the spirit as well as in the letter. It is the basic, organic law of this country; it is the supreme law of the land, which cannot be circumvented by any state official, whether acting within his discretion or not. The clear commands and prohibitions of the Constitution cannot be avoided by the kind of legal legerdemain advanced by the Appellees herein.

" . . . 'what cannot be done directly because of constitutional restriction, cannot be accomplished indirectly. . . . " Macallen Co. v. Massachusetts (1928), 279 U.S. 620, 629.

Not only was there no indication before the District Court of any actual performance of discretionary functions by the Appellees, but in fact there was evidence to the contrary. Attached to Appellants' Motion for New Trial in the District Court, as Exhibit 3 thereto, was an article written by Defendant and Appellee Joseph C. Houghteling, entitled "Confessions of a Highway Commissioner" and subtitled "Being in Account in Which the Rites and Mysteries of the California Highway Commission Are Revealed, With Specific Proposals for Reform". That article, in

its entirety is a part of the record herein.

Appellants therefore, refrain from belaboring its contents with extensive quotations. Suffice it to say that the contents of that article are a clear admission of the part of one of the Appellees herein that as a matter of fact, the California Highway Commission, when adopting condemnation resolutions, does not exercise any discretion, has no means of exercising any discretion nor any kind of a meaningful fact-gathering or investigatory process, and in fact is nothing more than a "rubber stamp" for the California Division of Highways.

And yet, notwithstanding the fact that not a shred of evidence was offered in support of the Appellees' assertions of discretionary act, and notwithstanding the fact that Mr. Houghteling's plain admissions of lack of exercise of discretionary functions were before the court, the District Court based its rulings on the "fact" that the Defendants acted within their discretion. See Reporter's Transcript, pages 34-35:

"MR. KANNER: . . . May I ask one thing of the court?

"When Your Honor makes the ruling, if Your Honor will be good enough to state the grounds so we will have a record of the present questions.

"THE COURT: I think I pretty well stated it. The ground mainly is that it is based upon the theory that this is a state action but it is within the discretion of a Highway Commission, and as such not subject to review."

It is respectfully submitted that the above ground for the District Court's ruling is totally without support.

Finally, if one were to overlook arguendo that the finding of discretionary acts by the District Court is without foundation, one is still brought face to face with the undisputed and undeniable fact that two of the Defendants, namely Pedley and Erreca, are not members of the Highway Commission and, therefore, even under the District Court's erroneous view are not entitled to immunity.

It is respectfully submitted that even if one were to disregard the twenty-plus U. S. Supreme Court cases rejecting the concept of immunity of state officials, and if one were to accept the immunity argument of the Appellees, as well as the District Court's grounds for finding immunity, one would still have to conclude that no immunity exists as to Pedley and Erreca. Under any circumstances, as to Pedley and Erreca the District Court's ruling was erroneous and should be reversed.

IV

A DEPRIVATION OF PROPERTY RIGHTS HAS OCCURRED IN THE INSTANT CASE

One of the grounds upon which the court below based its order of dismissal, was that the acts alleged in Plaintiffs' complaint do not constitute a taking or damaging of property within the protection afforded by the United States Constitution (see CT 97).

The above finding of the District Court was based on an argument of the Appellees as to what constitutes a "taking" of property. The Appellees have argued that "taking" is synonymous with entry on or physical interference with the land. In other words, Appellees equate "taking" with "disseizin" or "ouster" or "trespass", as opposed to "deprivation" of any property right as "deprivation" is used in the Fourteenth Amendment.

The Appellees' arguments embrace a simplistic view of society which bears no relationship to the realities of today. Implicit in the arguments of Appellees is the image of Farmer Smith who owns Blackacre, and whose property rights are unimpaired as long as corn can be grown on Blackacre.

It is, of course, basic that property is not the land but a right, or more precisely, a group of rights.

"Property as heretofore defined, is composed of certain constituent elements, to wit, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. Of these elements the right of user is the most essential and beneficial. Without it all other elements would be of little effect, since if one is deprived of the use of his property, little but a barren title is left in his hands. This right of free and untrammelled user for legitimate purposes is fundamental and within the protection of the Federal Constitution." 42 Am. Jur. 189, Property §4.

"Property consists of the free use, enjoyment, and disposal of a person's acquisition without control or diminution save by the law of the land." Buchanan v. Warley (1917), 245 U.S. 60, 74.

A fortiori, the interference with the right of user deprives the owner of the benefit thereof, and is a "deprivation" within the meaning of the Constitution.

"The constitutional provision is addressed to every sort of interest the citizen may possess." United States v. General Motors (1944), 232 U.S. 373, 378.

"The rule is that an owner cannot be deprived of any of the essential attributes which belong to the right of property which is constitutionally protected are the right to acquire, hold, enjoy, possess, manage, insure, and improve property, and the right to devote property to any legitimate use." 16 Am. Jur. 2d 695, Constitutional Law §366.

"The owner has the constitutional right to make any use of [his property] he desires so long as he does not endanger or threaten the safety, health, and comfort or general welfare of the public. Its enjoyment cannot be interfered with or limited arbitrarily." 16 Am. Jur. 2d 563-564, Constitutional Law §290.

"It is well settled that a taking of property within the meaning of the constitution may be accomplished without formally divesting the owner of his title to the property or of any interest therein. Any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional provision. " Nichols on Eminent Domain, Vol. 2, §6.1[1], pp. 367-369.

"Another principle, quite as important and quite as fundamental, is that 'taking' of property within the meaning of the constitution is not restricted to a mere change of physical possession, but includes a permanent or temporary deprivation of the owner of its use. The principle is thus stated by Lewis on Eminent Domain as follows: 'If property then consists not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that when a person is deprived of any of those rights he is to that extent deprived of his property and hence that his property may be taken in the constitutional sense though his title and possession remain undisturbed; and that it may be laid down as a general proposition based upon the nature of property itself that whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or

destroyed by reason of the power of eminent domain, his property is pro tanto taken and he is entitled to compensation.' (2d ed. sec. 56, 3d ed. sec. 65)

It is also clear that to take the use of property is to take property within the meaning of the constitution.

. . . " Southern Pacific Co. v. Railroad Commission (1939), 13 Cal. 2d 89, 117.

" . . . a law is considered as being a deprivation of property within the meaning of this constitutional guaranty if it deprives owner of one of its essential attributes, destroys its value, restricts or interrupts its common, necessary, or profitable use, hampers the owner in the application of it to the purposes of trade, or imposes conditions upon the right to hold or use it and thereby seriously impairs its value. These general principles apply not only to statutes enacted by the legislature but to the action of executive officers generally." Indian Refining Co. v. Ambraw etc. Dist. (1932), 1 F. Supp. 937, 939-940. (Emphasis added).

In the case at bench, the Appellants in February 1965, had a valuable piece of land upon which a major development and construction project was commencing. About two months later, Appellants had the same piece of land with construction begun and stopped (and the attendant scarring of the land), a mountain of bills

and liabilities incurred for the preparation and construction which was now abandoned, and a pile of leases with tenants of the shopping center, which were reduced to worthless scraps of paper.

All of the above happened not because Appellants' property rights somehow vanished, but because of the intervening representations and threats of Pedley, and acts of the other Defendants passing their condemnation resolution which was never implemented nor intended to be implemented.

The unwarranted and fraudulent threats of litigation by Pedley deprived Appellants of the use of their land just as effectively as a physical taking. A private citizen confronted by a state official with an impressive title and superior knowledge, and ordered to stop his activity on pain of lawsuit by the state, is obviously going to obey.

"People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around." Bantam Books v. Sullivan (1963), 372 U.S. 58, 68.

The damages are real and described in the complaint. Plaintiffs should be permitted their day in court to offer proof.

CONCLUSION

"December 3, 1627

"It is by my order and for the good of the State
that the bearer of this has done what he has
done.

Richelieu."

The Court will, no doubt, recognize the above words as the notorious carte blanche of Alexandre Dumas' novel "The Three Musketeers", a document issued in the King's name, which granted to its bearer immunity from legal process, regardless of the misdeeds the bearer may have committed.

While Dumas' work was fiction, the document was all too real. Although Dumas referred to it as a carte blanche, the correct legal term for such papers was lettres de cachet (see Roscoe Pound, The Development of Constitutional Guarantees of Liberty, Yale University Press, p. 24).

In the case at bench, it is clear that what the Appellees really want, is to have this Court bestow upon them by its opinion just such a lettre de cachet. They seek a pronouncement from the Federal Courts that they as state officials, to borrow Richelieu's language, "have done what they have done" and cannot be held accountable for it in a court of law.

Brought into its true perspective, the Appellees' theory is untenable and intolerable.

"The pride and glory of Anglo-American common law have been thought to be the principle that no man is above the law administered by the ordinary courts of the realm, and that 'color of office' consequently creates no immunity for the 'unlawful invasion for another's rights'." 21 Minn. L. R. 263.

The notion that the King was immune arose not from "sovereignty", but from the nature of the feudal system wherein a feudal lord could not be sued in his own courts; the King, being the highest lord was thus above all courts.

As early as 1285, the statute of Westminster II gave a right of action against sheriffs and bailiffs of franchises. The later remedies of bills of exchequer and petitions of right have provided the necessary remedies to the end that British subjects injured by governmental action could secure relief. The modern English view is perhaps best summed up by Dicey, Introduction to the Studies of the Law of the Constitution (7th edition, 1908), page 189:

"In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the prime minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen.

The Reports abound in cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment or to the payment of damages, for acts done in their official character but in excess of their lawful authority. "

The above summary of the modern English view closely coincides with American law. See, for example, the U. S. Supreme Court's language in United States v. Lee (1882), 106 U.S. 197, 209:

"Under our system the people who are there [in England] called subjects, are the sovereign. Their rights whether collective or individual, are not bound to give away to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him, for the protection and enforcement of that right. "

It should be noted that the old English doctrine of sovereign

immunity was not carried over to this country as to the States. Chisholm v. Georgia (1793), 2 Dall. 419. (Also see 34 Yale L. J. 4.) It was only by the adoption of the Eleventh Amendment to the U. S. Constitution, that states were granted immunity from suit in Federal Courts by a citizen of another state. This immunity was later expanded by judicial decision to also include suits in Federal Courts against the state by the state's own citizen. Hans v. Louisiana (1890), 134 U.S. 1.

But such immunity from suit has only been granted to the states and not to state employees sued for their own wrongs. This has been the rule followed by the U. S. Supreme Court on innumerable occasions, ever since the first impression case of Osborn v. United States Bank (1824), 9 Wheat. 738.

"But immunity from suit is a high attribute of sovereignty - a prerogative of the state itself - which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they may have injured one of the state's citizens." Hopkins v. Clemson Agricultural College (1910), 221 U.S. 636, 642.

And yet, in the case at bench, the Appellees take the position that these rules of law, representing the profound expression of our political and judicial philosophy, should be cast aside and disregarded. A state official - say the Appellees - must not

even be discommoded to make a defense when it is alleged that he has committed an actionable wrong in violation of the Constitution. His mere status as a state official - according to the Appellees - is enough to create a conclusive presumption that he acted within his discretion, and that he is not subject to any judicial action. The Appellees' arguments would, if accepted, render the U. S. Constitution ineffective and the Federal judiciary impotent. Such arguments should be rejected, and the decision of the court below reversed so as to achieve justice on the merits.

Respectfully submitted,

FADEM, BROWN AND KANNER

By: GIDEON KANNER

Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gideon Kanner

GIDEON KANNER

APPENDIX

This Appendix contains quotations from United States Supreme Court cases rejecting the concept of immunity from lawsuit of state officials sued individually for their wrongs committed under color of their office.

Not quoted herein, but likewise supporting Appellants' position, are the following:

Monroe v. Pape (1961), 365 U. S. 167;

Griffin v. School Board of Prince Edward County
(1964), 377 U. S. 218, 228;

Graham v. Folsom (1906), 200 U. S. 248.

" . . . The theory of the [14th] Amendment is that where an officer or other representative of a state, in the exercise of the authority with which he is clothed, misuses the power possessed to do a wrong forbidden by the Amendment, inquiry concerning whether the state has authorized the wrong is irrelevant, and the Federal judicial power is competent to afford redress for a wrong by dealing with the officer and the result of his exertion of power. "

Home Telephone and Telegraph Co. v. Los Angeles

(1913), 227 U. S. 278, 288; 57 L. Ed. 510, 515

(Emphasis added).

"The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal Constitution, they are subject to the process of the Federal courts in order that the persons injured may have appropriate relief. " Sterling v. Constantin (1932), 287 U. S. 378, 393; 77 L. Ed. 375, 382.

"If the conduct of the defendant constitutes an unwarrantable interference with the property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded . . . " Ickes v. Fox (1937), 300 U. S. 82, 97.

"But immunity from suit is a high attribute of sovereignty--a prerogative of the state itself, - - which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create

a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to be put above the law. For how 'can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders. . . whenever they interpose the shield of the state? . . . The whole frame and scheme of the political institutions of this country, state and Federal protest' against extending to any agent the sovereign's exemption from legal process. (Citation). "Hopkins v. Clemson Agricultural College (1910), 221 U. S. 636, 642-643; 55 L. Ed. 890, 894. Cited with approval in Johnson v. Lankford (1917), 245 U. S. 541; 62 L. Ed. 460.

"This distinction [between the state and persons acting on its behalf] is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government based on the sovereignty of the people, from that despotism whether of the one or the many, which enables the agent of the State to declare and decree that he is the State - - to say "L'Etat, c'est moi." Of what avail are

written constitutions, whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battle field and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. "

Poindexter v. Greenhow (1884), 114 U. S. 270, 29 L. Ed. 185, 193.

"The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the state, they -- though not exempt from suit -- could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. (Citation) But if it appeared

that they proceeded under an unconstitutional statute, their justification failed, and their claim of immunity disappeared on the production of the void statute. Besides, neither a state nor an individual can confer upon an agent authority to commit a tort, so as to excuse the perpetrator. In such cases the law of agency has no application, -- the wrongdoer is treated as a principal, and individually liable for the damages inflicted. "Hopkins v. Clemson Agricultural College (1910), 221 U. S. 636, 643; 55 L. Ed. 890, 894 (Emphasis added).

"Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of government.

In these cases he is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him. "Reagan v. Farmers Loan & Trust Co. (1894), 154 U. S. 362, 391; 38 L. Ed. 1014, 1021.

"In the other instances relief was sought under general law from wrongful acts of officials. In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally." Great Northern Life Ins. Co. v. Read (1944), 322 U.S. 47, 51; 88 L. Ed. 1121, 1124.

"When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to a private person under like circumstances. When she or her representatives are properly brought into the forum of litigation, neither she nor they can assert any right or immunity as incidents to her political sovereignty." Davis v. Gray (1873), 16 Wall 203, 21 L. Ed. 447, 457 . (Emphasis added).

" . . . appellants assert that the court was powerless thus to intervene and that the Governor's order had the quality of a supreme and unchallengeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government.

If this extreme position could be deemed to be well taken, it is manifest that the fiat of a

state Governor, and not the Constitution of the United States, would be the supreme law of the land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases, the futility of which the State may at any time disclose by the simple process of transferring powers of legislation to the Governor to be exercised by him, beyond control, upon his assertion of necessity. Under our system of government, such a conclusion is obviously untenable. There is no such avenue of escape from the paramount authority of the Federal Constitution. When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression. To such a case the Federal judicial power extends (Art. 3, §2) and, so extending, the court has all the authority appropriate to its exercise." Sterling v. Constantin (1932), 287 U.S. 378, 397-398; 77 L. Ed. 375, 385.

" . . . where the state official, instead of directly interfering with tangible property, is about to commence suits which have for their object the

enforcement of an act which violates the Federal Constitution, to the great and irreparable injury of the complainants, he is seeking the same justification from the authority of the state as in other cases. The sovereignty of the state is, in reality, no more involved in one case than in the other. The state cannot, in either case, impart to the official immunity from responsibility to the supreme authority of the United States." Ex parte Young (1908), 209 U. S. 123, 167; 52 L. Ed. 714, 732. (Emphasis added)

"The [railroad] commission was created by the state of Mississippi, under the authority of its Constitution and laws, for the purpose of supervising, and, to some extent, controlling, the acts of the railroads operating within the state. Such a commission is subject to suit by a citizen. (Citations)." Mississippi Railroad Commission v. Illinois Central R. Co. (1906), 203 U. S. 335, 340; 51 L. Ed. 209, 213.

Holding the bank commissioner of Oklahoma liable in damages:

"The present case finds example in Hopkins v. Clemson Agri. College, 221 U. S. 636, 55 L. Ed.

890, 35 L. R. A. (NS) 243, 31 S. Ct. Rep. 654, where the college was held liable for acts of trespass upon private property, and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a 'high attribute of sovereignty -- a prerogative of the state itself -- which cannot be availed of by public agents when sued for their own torts.' "

Johnson v. Lankford (1918), 245 U. S. 541, 546; 62 L. Ed. 460, 463.

In an action against Georgia State Revenue Commissioner:

"The state is free to carry out its functions without judicial interference directed at the sovereign or its agents, but this immunity from federal jurisdiction does not extend to individuals who act as officers without constitutional authority." Georgia R. & B. Co. v. Redwine (1952), 342 U. S. 299, 305-306; 96 L. Ed. 335, 341.

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property

of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages . . . , is not within the meaning of the Eleventh Amendment an action against the State. " Pennoyer v. McConnaughy (1891), 140 U.S. 1, 35 L. Ed. 363, 365; Ex parte Tyler (1893), 149 U.S. 164, 190; 37 L. Ed. 689, 698. (Emphasis added).

In an action against state officials of South Carolina:

"The intentional, malicious, and repeated interference by the defendants with the exercise of rights and privileges secured to the plaintiff by the Constitution of the United States, as alleged in the complaint, constitutes, as we think, a wrong and injury not the subject of compensation by mere money standard, but fairly within the doctrine of the cases wherein exemplary damages have been allowed. "

Scott v. Donald (1897), 165 U.S. 58, 89; 41 L. Ed. 632, 638.

In an action against the attorney general of Nebraska:
"The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war, -- all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations." Prout v. Starr (1903), 188 U. S. 537, 543; 47 L. Ed. 584, 587.

" . . . The people, through the Constitution of the United States, 'established a more perfect union by substituting a national government, acting, with ample power, directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the States'. In no other way can the supremacy of that **Constitution** be maintained. It creates a government in fact as well as in name because its Constitution is the supreme law of the land, 'anything in the Constitution or laws of any State to the contrary notwithstanding'; and its authority is enforced by the power to regulate the and govern the conduct of individuals, even where its prohibitions are laid only upon the States themselves. The mandate of the State affords no justification for the invasion of rights secured by the Constitution of the United States; otherwise that Constitution would not be the supreme law of the land." Poindexter v. Greenhow (1884), 114 U.S. 270, 29 L. Ed. 185, 193. (Emphasis added)

" . . . in truth the [14th] Amendment contemplates the possibility of state officers abusing the powers lawfully conferred upon them by doing wrongs prohibited by the Amendment. In

other words, the Amendment, looking to the enforcement of the rights which it guarantees and to the prevention of the wrongs it prohibits, proceeds not merely upon the assumption that states, acting in their governmental capacity, in a complete sense, may do acts which conflict with its provisions, but, also, conceiving, which was more normally to be contemplated, that state powers might be abused by those who possessed them, and as a result might be used as an instrument for doing wrongs, provided against all and every such possible contingency." Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 288; 57 L. Ed. 510, 515.

"Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so make such administration an illegal burden and exaction upon the individual." Greene v. Louisville & I. R. Co. (1917), 244 U.S. 499, 507; 61 L. Ed. 1280, 1285.

No. 21153

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS SANDERS, *et al.*,

Appellants,

vs.

JOHN ERRECA, *et al.*,

Appellees.

Appeal From the United States District Court for the
Southern District of California Central Division.

APPELLEES' BRIEF.

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Appeal From the United States District Court for the
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APPELLEES' BRIEF.

Introductory Statement.

This case is an attempt by the Appellants to show the deprivation of a federally protected property right by state officers acting in their official capacities for the California Highway Commission (hereinafter referred to as the Commission) and the California Department of Public Works (hereinafter referred to as the Department). They claim that Appellees, individually, engaged in acts preliminary to the filing of a condemnation action which allegedly prevented Appellants from converting an old shopping center to a new one on their property.

These acts are briefly described as: a representation that Appellants' property was needed for freeway construction and that litigation would be commenced if de-

velopment to the new shopping center continued; the passage of a condemnation resolution by the Commission; and the failure to promptly institute a condemnation suit by the Department. In fact, a condemnation suit was filed while this action was pending in the District Court based on an amendment to the original resolution authorizing a reduction in the size of the Appellants' property required for the freeway due to a change in its design.

Appellees contend that the reduction in the size of the property to be taken, the threats of litigation—both verbal and written (resolution), and the delay in prosecuting the litigation do not amount to a deprivation of a property right guaranteed by the United States Constitution, and further that the alleged acts attributable to Appellees as members of the Commission were done in the exercise of a discretionary function for which they are immune.

Restatement of the Case.

Appellants have summarized the factual allegations contained in the Amended Complaint and the assertions in support of their motion for new trial. (A. B. pp. 2-4.)*

The amended complaint, which was filed after Defendants' motion to dismiss, added paragraph 8 purporting to allege misconduct by Defendant Pedley in failing to acquire the property promptly and misconduct by Defendant Erreca for failing to take good faith steps to acquire the property. [C. T. p. 32.]

*A. B. designates Appellants' Opening Brief; C. T.—Clerk's Transcript; R. T.—Reporter's Transcript.

Appellants admitted that no misconduct was alleged as to Defendant Erreca in the original complaint and sought to impose liability on him through paragraph 8 of the Amended Complaint. Reading the amended complaint and Affidavit of Leon Groode together, the following is alleged to have transpired.

Appellants while in the process of converting their old shopping center to a new one were informed that their property would be taken for a freeway and were requested to cease further development. Appellants were also informed that if development did not stop litigation would be commenced to prevent development. If development was not continued Appellants were informed that their property would be appraised and acquired within six months. [C. T. p. 180.] The above conversations took place on March 30, 1965.

The Highway Commission passed the condemnation resolution on May 26, 1965 less than two months after the above discussion. A cloud on title is alleged as a result thereof.

Approximately six months after the discussion with Appellants or sometime in September, 1965, they were informed that the taking was to be reduced to a partial acquisition rather than a total, and that another one-half year would be required to reappraise the property and obtain another condemnation resolution. [C. T. pp. 180-181.]

The amending resolution authorizing a partial take due to a design change was passed on February 16, 1966 [C. T. p. 143] and a condemnation action was commenced on March 7, 1966. [C. T. p. 145.]

Appellants further allege that by reason of the above acts "plaintiffs' property has effectively been taken" and "without making any compensation" defendants under color of state law have subjected plaintiffs to the deprivation of "rights secured by the United States Constitution and laws, that plaintiffs' property not be taken, except for public use and then only upon payment of just compensation." [C. T. pp. 32-33.]

Appellants' motion for new trial on the grounds of newly discovered evidence (amended resolution and magazine article) was denied for lack of sufficiency and lack of diligence. [C. T. p. 199.]

Questions Presented.

1. Do threats of litigation including the passage of a condemnation resolution, and delay in prosecuting litigation amount to the deprivation of a property right guaranteed by the 14th Amendment to the Constitution?
2. Are members of the State Highway Commission immune from civil liability in the exercise of their discretionary duty in passing condemnation resolutions?

ARGUMENT.

Summary.

Appellees do not arrogate to themselves the divine right of kings or sovereign immunity. Nor was any attack made upon the federal supremacy clause in the court below and none is advanced here. Finally, no claim is made that a state employee is immune because he works for the state. These were not issues before the trial court and no useful purpose would be served by responding to that part of Appellants' brief devoted thereto.

The issues in this case are narrow: has plaintiff been deprived of a property right; and are the commissioners who exercise a discretionary function delegated to them by the legislature immune? Though narrow, these issues involve profound questions dealing with real property rights as defined by the courts, and federal-state relationships.

The interpretation of deprivation which Appellants seek is vague and uncertain covering a multitude of "sins" not within the scope of the Constitution. Their argument is akin to Specification of Errors 4 (A. B. p. 6) wherein taking and damaging are distinguished from deprivation of a property right — a distinction without a difference.

Appellants also request this court to impose liability on the commissioners predicated on the simple assertion of "bad faith" and to ignore that delicate federal-state harmony based on the traditional view that certain state officers should not be required to defend purely discretionary acts. If such a request is granted the harassment of these officials would be unlimited consid-

ering only the countless number of resolutions needed in this freeway oriented society.

What appellants complain of here is that threats of litigation and the delay in the process of eminent domain have done them harm. Nowhere in the complaint, however, do they relate these acts to the deprivation of a property right. The claim that their property was taken without compensation is an erroneous legal conclusion and was properly denied by the trial court.

I.

Appellants Have Not Alleged the Deprivation of a Right Secured by the Constitution to Permit Recovery Under the Civil Rights Act.

The protections of the 5th and 14th Amendments guaranty the same rights (*Appleby v. Buffalo* (1911), 221 U.S. 524, 31 S. Ct. 699, 55 L. Ed. 838), *i.e.*, “nor shall private property be taken for a public use, without just compensation.”

The Civil Rights Act (28 U.S.C. 1983) grants jurisdiction to the Federal Courts only where there has been a deprivation of a constitutionally guaranteed right. *O'Connor v. O'Connor* (1963), 315 F. 2d 420.

Because of the various acts alleged, the sundry rights disturbed, and the varied roles of the defendants, this portion of the argument is divided in three parts. The acts analyzed individually or as a course of conduct lead to the same result — that no claim is stated. The acts and the rights they are claimed to impair are as follows:

a. The passage of the condemnation resolution as a cloud on title.

b. The threats of Defendant Pedley as an impairment of use; and

c. The reduction in size and delay in filing suit as a loss in value.

A. The Passage of a Resolution Authorizing the Acquisition of Property by Eminent Domain Is Not a Cloud on Title as a Matter of Law.

Appellants' complaint and argument misconceive the legal effect of a condemnation resolution. It does not as claimed affect the owner's rights under state or federal law.

In *Silva v. San Francisco* (1948), 87 Cal. App. 2d 784 the owner sought declaratory relief by way of inverse condemnation claiming that condemnation proceedings had been authorized by the city's resolution but that no suit had been filed to implement the authorization. He sought to have the value of his property frozen to protect him from harm from fluctuations in the market. The court's comment on the effect of the resolution is:

"In the present case there has been no taking of the land—no entry or physical interference with plaintiff's property. Compensation is not payable until there is a 'taking' or progress in the contemplated improvement. . . ." (pp. 787-788.)

The federal courts have also held that enabling legislation or authorization to condemn is not a taking within the framework of federal eminent domain procedure. In *23 Tracts of Land v. U.S.* (1949), 177 F. 2d 967 it was stated at page 969:

"The claim for compensation to which a landowner is entitled for the taking of his property

by governmental authority arises at the time of the taking. The enactment of legislation which authorizes condemnation of property is not such a taking even though it may cause a change in the value of the property.”

Nor does the passage of a condemnation resolution deprive an owner of rights under the Civil Rights Act. *Robinette v. Chicago Land Clearance Commission* (1951), 115 Fed. Supp. 669 involved a claim by the owners that the resolution passed by the commission threatened the value of their property in violation of the Civil Rights Act of 1871. The court observed at page 672:

“ . . . it should be noted that such administrative action is merely a preliminary step in the process of exercising the power of eminent domain. No property is taken in the proceeding, *nor are the property rights of the landowners affected in any manner.*” (Emphasis added.)

The law is clearly expressed by both federal and state decisions: no cloud on title is created by passage of the condemnation resolution, and no property rights are violated. The Appellants’ conclusion that the resolution created a cloud is wrong as a matter of law.

The fatal defect in Appellants’ argument is pointed out in *Devine v. Los Angeles* (1906), 26 S. Ct. 652, 202 U.S. 313, 50 L. Ed. 1046 where the owner sought to remove under the authority of the Civil Rights Act an alleged cloud on the title of his property.

“The test as to when a cloud is or is not cast, as stated by Mr. Justice Field, then chief justice of California, in *Pixley v. Huggins*, 15 Cal. 127, and

reasserted in *Hannewinkle v. Georgetown*, 15 Wall, 547, 21 L. Ed. 231, is undoubtedly applicable and demonstrates that the assertion of unconstitutionality cannot be resorted to to maintain federal jurisdiction as constituting a cloud. The averment of unconstitutionality is a mere pretext to obtain that jurisdiction.” (202 U.S. 335, 50 L. Ed. 1054.)

So, too, in the case at bar Appellants assert unconstitutionality to obtain jurisdiction, but fail to allege even with the overworked phrase “passed in bad faith” a cloud on their title.

B. The Verbal Threats of Litigation Alleged Against Defendant Pedley Do Not Constitute a Violation of Constitutional Rights.

Appellants state (A. B. p. 37) that “any limitation on the free use and enjoyment of property constitutes a taking of property within the meaning of the constitutional amendment (5th).” This is a correct statement of the law from *Nichols on Eminent Domain* but is incomplete. The text goes on (2 *Nichols*, *Eminent Domain* 6.1 [1] to state at pages 369-371:

“It is sufficient that the person claiming compensation has some right or privilege in the appropriated property, *which right or privilege is destroyed, injured or abridged by such appropriation.*” (Emphasis added.)

and continues at page 373:

“A mere declaration of an intention to take, *or even a threat to take*, cannot constitute a taking under the fifth amendment. And it has been held that, though the facts may constitute a tort, an unintentional taking will not constitute an appropria-

tion within the meaning of the constitutional amendment dealing with the appropriation of property to a public use.” (Emphasis added.)

Defendant Pedley’s alleged threat to take action occurred prior to the resolution and thereby was claimed fraudulent. By reason of this act, states the complaint, “Plaintiffs’ property has effectively been taken, by depriving plaintiffs of their right and opportunity to use, develop, lease and encumber the subject property.” [C. T. p. 32.]

A similar legal conclusion was rejected by *Hamer v. State Highway Commission* (1957), 304 S.W. 2d 869. There the commission proposed to construct a highway across land the owner was developing to a subdivision, and on the direction by commission agents not to develop the part needed for the right of way, the owner redesigned his entire plan. The highway location was changed and no land was taken from the plaintiff, who had withheld a portion of his land from the subdivision relying on the representation.

The Supreme Court of Missouri stated the issue at page 871:

“We have the sole question of whether the above acts constitute a taking or damaging of plaintiff’s property within the meaning of Art. I S. 26, Constitution of Missouri, 1945, which in part here material, provides ‘that private property shall not be taken or damaged for public use without just compensation.’ ”

And held at page 872:

“Also, it has properly been held that the serving or giving of notice of intention to condemn, . . . the

actual filing of the condemnation petition, . . . the passing of ordinances and resolutions authorizing the condemnation, . . . and the negotiation with the owner for the purchaser of the land needed for a public improvement, . . . do not of themselves constitute the taking or damaging of property in the constitutional sense. In none of these situations is there a physical taking *or any invasion or appropriation of any right of the owner to the use of his property.*" (Emphasis added.)

An analagous situation developed in California in the case of *Hilltop Properties v. State* (1965), 233 Cal. App. 2d 349 involving an appeal from an order sustaining defendant's demurrer to the complaint. The District Court of Appeal characterizes the owner's claim as follows at page 354:

"Although pleaded somewhat ineptly, it is apparent that the theory of this cause of action is that subject parcels were taken for public use when they were caused to be withheld from the development of the larger parcel at the instance and request of defendant pending negotiations for their acquisition."

And disposed of the plaintiff's theory in the following manner at page 361:

"We are satisfied that in light of the foregoing principles plaintiff has not alleged any facts from which it can reasonably be inferred that defendant has in any way *invaded, appropriated, or interfered with plaintiff's use or enjoyment.*" (Emphasis added.)

The court did, however, point out that recovery might be allowed on the non-constitutional ground of estoppel where exceptional circumstances could be shown.

Threats by defendant Pedley to compel the Appellants to withhold development of the subject property pending negotiations do not invade or interfere with their use of the property under the above authorities. Like the verbal assertions of ownership by City officials in *Devine v. Los Angeles, supra*, the Civil Rights Act does not protect against such conduct. (202 U.S. 337, 50 L. Ed. 1054.) The reason for such a rule is obvious. Nothing is taken from the owner. If nothing is taken there is no violation of the 5th and 14th Amendments, and no claim exists under Section 1983 of the Civil Rights Act.

Progress Development Co. v. Mitchell (1961), 286 F. 2d 222 is relied on heavily by Appellants (A. B. pp. 19, 26-27) and was argued with equal vigor to the trial court. The case is clearly distinguishable. There certain village officials including the local park commissioners were engaged in a conspiracy to prevent the plaintiffs from developing land into an integrated community based on a pre-announced formula. Permits for development were denied and the village commenced condemnation proceedings not for the purpose stated, a park, but to prevent plaintiff from carrying out its announced scheme. Here public use is conceded. (A. B. p. 24.) In *Mitchell* the public purpose was a pretext to take the plaintiff's land and thereby to prevent it from doing business in a certain manner.

No such conduct is alleged here. While preliminary steps in the acquisition of Appellants' land were initiated, they did not operate to take the land or to de-

prive them of its use. The heart of the case as argued by Appellants' counsel [R. T. pp. 18-19] is that but for the statements of Defendant Pedley there would have been a shopping center on the property at the time of issuance of summons—since there is no new shopping center improvement the land will be valued without reference to it, and the owner will not receive its value in the state condemnation action when the land is taken. Assuming the tort is alleged does it lead to a constitutional violation? The owners may still receive just compensation based on the value of the land for all of its uses and purposes as though there had been no taking. Their right to compensation has not been affected.

Appellants' novel theory that any state officer is liable under Section 1983 for every tort overlooks the requirement that there must be a clear constitutional violation in order for the federal courts to invoke jurisdiction. *Holt v. Indiana Mfg. Co.* (1899), 176 U.S. 68, 44 L. Ed. 374. None is alleged in the complaint.

C. The Alleged Delay in Acquisition and the Reduction in Size of the Proposed Taking Do Not Deprive Appellants of Any Property Rights Secured by the Constitution.

The original complaint charged Defendant Erreca with bad faith as a member of the commission. [C. T. p. 4.] The amended complaint charges him with acts independently of the commission [C. T. p. 65], in failing "to cause any good faith steps to be taken by the Department of Public Works for the acquisition of the subject property." [C. T. p. 32.] The amended complaint goes on to accuse Defendants Erreca and Pedley with bad faith in causing the acquisition to be delayed.

The delay is alleged to have caused the destruction of the shopping center and the value of the property. In order to support this allegation Appellants relied on a line of cases cited in 31 A.L.R. 370 dealing with needless delay and abandonment of condemnation proceedings.

However, before condemnation proceedings have been commenced negligent or wilful delay in implementing an ordinance authorizing such proceedings does not affect the owner's right to possession and use under the constitutional provision. *Lord Calvert Theatre Inc. v. Baltimore* (1956), 208 Md. 606, 119 A. 2d 415. To the same effect, *Shoemaker v. United States* (1892), 147 U.S. 282, 13 S. Ct. 361, 37 L. Ed. 170.

In *State v. Beck* (1933), 63 S.W. 2d 814, 92 A.L.R. 373, the city negligently delayed proceedings over a period of ten years and ultimately acquired only a portion of the property originally needed. During the interim the owner claimed damages due to his inability to rent, sell, improve and finance the property.

The Missouri Court analyzed the City's misconduct in the following manner:

"Respondent in his brief contends: 'Since, therefore, as a result of the institution of the condemnation proceedings and their ultimate partial dismissal, there has been a taking of property or at least a serious damage thereto for public use, the movent below is clearly entitled under the Constitution to compensation therefore'. . . . In the proceeding pending before the respondent there will *not*, as regards damages for pendency and delay of the suit, be a taking of the property *or a damage of the property* as is contemplated by the

Charter of the City of St. Louis *or the Constitution* of this state that can be determined in a condemnation suit.” (92 A.L.R. 378; Emphasis added.)

The above decision is especially noteworthy since it recognized the existence of tortious conduct, but held that the constitution itself did not provide a basis for recovery or compensation for either the wrongful delay or reduced taking.

Also in *Silva v. San Francisco, supra*, there appears to have been a lengthy delay following the resolution prompting the owner to file his unique action. Speaking of the time between the resolution and the filing of suit, the Court comments:

“Assuming the proper rule to be that compensation in such cases shall accrue at the date of summons there is *no rule called to this court’s attention which provides that the government’s complaint herein must be filed within a given period.*” (87 Cal. App. 2d p. 788; Emphasis added.)

The statute involved in this situation is California Streets and Highways Code, Section 102, which provides in part:

“In the name of the people of the State of California the department *may* condemn for state highway purposes, under the provisions of the Code of Civil Procedure relating to eminent domain, any real property or interest therein which it is authorized to acquire. The department shall not commence any such proceeding in eminent domain unless the commission first adopts a resolution declaring that public interest and necessity require the

acquisition, construction or completion by the State, acting through the department, of the improvement for which the real property or interest therein is required and that the real property or interest therein described in such resolution is necessary for the improvement." (Emphasis added.)

The statute therefore leaves the filing of the action within the discretion of department officials. The timing of the action would necessarily be included within this discretionary function. *County of Mateo v. Coblurn* (1900), 130 Cal. 631, 635.

Appellants by the device of imposing liability on state agents seek to have the Federal Courts supervise and control the initiation of condemnation proceedings when such proceedings are not commenced to their satisfaction or whim. The prospect of liability in such a situation would certainly lead to a disruption of the orderly process of the proceedings to acquire property for a public purpose in the state courts.

In fact, under such circumstances the property is valued as though no eminent domain proceedings were pending or likely, so that assuming *arguendo* that there is a loss in value occasioned by the delay it will not affect the owners' constitutional right to just compensation. (*Atchison, Topeka & Santa Fe Ry. Co. v. So. Pac. Co.* (1936), 13 Cal. App. 2d 505, 517-518.)

The same reasoning would apply to the determination to reduce the size of the proposed taking which was alleged as newly discovered evidence. In fact as the court determined, such evidence was not newly discovered, but was known by Appellants' agent in September [C. T. p. 181] or October, 1965 [C. T. pp. 191,

194], several months prior to the commencement of this action.

In any event Appellants claim of a loss in value is specious, since under California law the owner is entitled to severance damages in the case of a partial taking. (*People v. Ricciardi* (1943), 23 Cal. 2d 390, 400.)

II.

Members of the Commission Are Immune From Liability Under the Civil Rights Act When They Are Exercising the Discretionary Function of Adopting Resolutions Delegated by the Legislature.

The commission is created by state statute. (California Streets and Highways Code, Sec. 70.) The ensuing sections grant to the commission the necessary powers to carry out the highway and freeway program within the state, including the power to authorize the department to acquire private property by eminent domain. (California Streets and Highways Code, Secs. 102 and 103.)

“The practice of delegating to administrative officers or boards powers which were originally performed directly by the legislature is of long standing and has met the approval of the highest courts in this state as well as in other jurisdictions.”

Holloway v. Purcell (1950), 35 Cal. 2d 220, 231.

The Supreme Court has held that the function of authorizing the condemnation of private property is an exercise of legislative discretion in the following words:

“The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may either

be exercised by the Legislature or delegated by it to public officers. . . . *They are legislative questions, no matter who may be charged with their decision. . . .*" (Emphasis added.) *Rindge Co. v. Los Angeles* (1922), 43 S. Ct. 689, 693, 262 U.S. 700, 709, 67 L. Ed. 1186.

Other cases holding that the California Highway Commission performs a discretionary function in passing condemnation resolutions are: *People v. Chevalier* (1959), 52 Cal. 2d 299, 307 and *People v. Olsen* (1930), 109 Cal. App. 523, 531.

The commission, therefore, is acting for the legislature when it authorizes the power of eminent domain. It should enjoy the same immunity when exercising this discretionary power as the legislature. *Francis v. Lyman* (1954), 216 F. 2d 583, 587.

There is no question that a common law immunity for discretionary acts exists under the Civil Rights Act. (*Tenney v. Brandhove* (1951), 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019.)

The courts have generally recognized legislative and other governmental immunities from the thrust of the Civil Rights Act. (*Delaney v. Shobe* (1964), 235 Fed. Supp. 662, 665.) And this Court has also followed the immunity doctrine as an implied limitation on the scope of the Civil Rights Act.

"No immunity from liability for the proscribed conduct is mentioned in the statute, but courts have engrafted an immunity in favor of certain public officials for acts done in the performance of their traditional official functions. The immunities recognized in these cases are generally

those which were respected at common law. See, e.g. *Tenney v. Brandhove* (state legislator). Among the cases in which the immunity of a judge has been upheld are (Citations). On the other hand certain public officers, such as policemen have been held not to be immune. (Citations) The arguments generally advanced in support of immunity are, '(1) the danger of influencing public officials by threat of a law suit; (2) the deterrent effect of potential liability on men who are considering entering public life; (3) the drain on the valuable time of the official caused by insubstantial suits; (4) the unfairness of subjecting officials to liability for the acts of their subordinates; (5) the theory that the official owes a duty to the public and not to the individual; (6) the feeling that the ballot and the formal removal proceedings are far more appropriate ways to enforce the honesty and efficiency of public officers.' Comment, 66 Harv. L. Rev. 1285, 1295 n. 54 (1953). *That these are important considerations cannot be questioned.*" (Emphasis added.)

Robichard v. Roman (1965), 351 F. 2d 533, 535.

Here the Appellants ask that by the conclusion in the pleadings of "bad faith" the commissioners must undergo the risk of a law suit. With the knowledge of the vast scope of the freeway program in this state, and the number of parcels of property necessarily involved, along with the built-in adversary nature of condemnation proceedings, subjecting these public officials to liability on the simple assertion of bad faith would result in harassment beyond contemplation.

It is quite true as Appellants assert that these are only men. To require them to endure the burden of a trial on potentially every resolution simply on the conclusion of the pleader would greatly impair their effectiveness. The trial court properly found that on the basis of the pleadings the commissioners were immune and that they should not be called upon in every case to prove such immunity. [R. T. p. 26, lines 1-4.] The purpose of the rule to protect against harassment would otherwise be obviated.

As the 5th Circuit pointed out in *Norton v. McShane* (1964), 332 F. 2d 855, the court must balance two considerations:

“... the protection of the individual citizen against damage caused by oppressive or malicious action on the part of public officers, and the protection of the public interest by shielding responsible governmental officers *against the harassment and inevitable hazards of vindictive or ill-founded damage suits based on acts done in the exercise of their official responsibilities.*” (332 F. 2d 857; emphasis added.)

The underlying reason for both legislative immunity and executive immunity appears the same, *i.e.*, to protect the public by insuring that its public officers are free to work efficiently without the constant interference that unlimited liability would exact.

This court has previously held executive officers of the state immune similar to the immunity granted federal officers in *Hoffman v. Halden* (1959), 268 F.

2d 280. The immunity was determined on the basis of the pleadings, at page 300:

“Though neither are Civil Rights cases, we are content to follow *O’Campo v. Hardisty*, supra and *Cooper v. O’Connor*, supra, (Internal Revenue Agents) in this case and extend immunity to a state officer for his discretionary acts within the scope of his authority.”

California courts follow the common law rule of immunity as demonstrated by the following quote from *Lipman v. Brisbane Elementary School District* (1961), 55 Cal. 2d 224, 229:

“In *Muskopf v. Corning Hospital District*, ante, p. 211 [11 Cal. Rptr. 89, 359 P. 2d 457], we held that the rule of governmental immunity may no longer be invoked to shield a public body from liability for the torts of its agents who acted in a ministerial capacity. But it does not necessarily follow that a *public body* has no immunity where the discretionary conduct of governmental officials is involved. [1] While, as pointed out in the *Muskopf* case, a governmental agent is personally liable for torts which he commits when acting in a ministerial capacity, a different situation exists with respect to discretionary conduct. Because of important policy considerations, the rule has become established that government *officials* are *not personally* liable for their discretionary acts within the scope of their authority even though it is alleged that their conduct was malicious. (*Hardy v. Vial*, 48 Cal. 2d 577, 582-584 [311 P. 2d 494]; *Coverstone v. Davies*, 38 Cal. 2d 315, 322 [239 P.

2d 876]; *White v. Towers*, 37 Cal. 2d 727, 730-732 [235 P. 2d 209, 28 A.L.R. 2d 636]; see *Barr v. Matteo*, 360 U.S. 564, 569 et seq. [79 S. Ct. 1335, 3 L. Ed. 2d 1434].) The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed than to subject honest officials to the constant dread of retaliation. (*Hardy v. Vial*, 48 Cal. 2d 577, 582-583 [311 P. 2d 494].)" (Emphasis added.)

The policy is the same as that underlying the reason for immunity under the Civil Rights Act. While Appellees do not contend that state law may insulate them from liability, the *Lipman* case is cited for authority on the scope of the common law rule.

The contention that the resolutions passed by the commission are not discretionary is unsound. Both statute and case law declare they are discretionary decisions within the scope of the commission's authority. The magazine article [C. T. pp. 132-135] by Defendant Houghteling alleged as new matter is nothing more than a statement that the commission is overworked, understaffed, and relies to a great extent upon the Division of Highways of the department for its information. Its decisions are no less discretionary because of these common governmental problems.

Appellants again, heavily rely on *Progress Development Co. v. Mitchell* (A.B. pp. 18-19) which states:

"The common law immunity of state legislators for their acts, . . . does not extend to *local* officials

charged with administering in a *discriminatory* manner the laws so as to preclude Negroes from moving into an all-white community." (286 F. 2d 231) (Emphasis added.)

Here the officials are not local, but state-wide. The effect of subjecting small town officials to liability is negligible compared to a state commission which conducts the business of the magnitude and responsibility described in the above-mentioned article by Defendant Houghteling. The harassment, hazards and numbers of suits potentially arising from the *Mitchell* ruling are minimal. Here the risk is incalculable.

Udall etc. v. Wisconsin et al. (1962), 306 F. 2d 790 cited by Appellants (A. B. p. 30) is, of course, not to the point. There, unlike here, the statute, itself, imposed no discretionary duty, but merely the application of a mathematical formula. The *Rindge*, *Chevalier*, and *Olsen* cases have already construed the duty in passing such resolution as discretionary.

Conclusion.

A close analysis of each of the allegations in the complaint reveals that they are fatally defective. The claim that the condemnation resolution encumbers the title is without legal foundation. This alone prevents recovery against the commission members.

Even assuming fraud has been alleged against Defendant Pedley, there was no taking or damaging of the property during negotiations within the meaning of those constitutional terms. Such conduct does not deprive the owner of his rights of use and enjoyment as those rights have been defined by the courts. Failure

to expedite the proceedings charged against Defendant Erreca does not affect the value of the property, nor can it deprive Appellants of their right to just compensation under California law.

Passage of the condemnation resolution to acquire the property for a public use, a freeway, is the exercise of a discretionary duty delegated to the commission by the California Legislature to effectuate that body's highway program. Liability should not attach to such deliberation and determination. To do so would completely ensnarl the commission in constant court defense and deter them from their delegated public function.

For the reasons above stated, it is respectfully submitted that the District Court's order dismissing the action against each and all defendants be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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NO. 21153

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vs.

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APPELLANTS' REPLY BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

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APPELLANTS' REPLY BRIEF

INTRODUCTION

Before proceeding to deal with the specific legal points sought to be raised by the Appellees in their brief, certain basic matters arising from the Appellees' brief should be first discussed, as they quickly lay bare the lack of merit inherent in the Appellees' position.

The Appellees, ultimately, rest their arguments on two propositions which are: (a) that a differentiation between taking of property and deprivation of a constitutionally protected right is "a distinction without a difference" (AB 5) ^{1/}, and (b) a presupposition that Appellees acted within the scope of their discretion (AB 4).

As to the first of the Appellees' propositions, a mere reading of the Fifth Amendment is sufficient to dispose of it:

1/ The abbreviations used are: AOB - Appellants' Opening Brief, AB - Appellees' Brief, CT - Clerk's Transcript, and RT - Reporter's Transcript.

" . . . nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation. "

Thus, if one were to accept the Appellees' argument that the words "taking" and "deprivation" draw a "distinction without a difference", then one would necessarily have to conclude that the framers of the Fifth Amendment to the United States Constitution created a meaningless redundancy. If the "taking" clause of the Fifth Amendment is the operative one, and is the same as the "deprivation" clause, then what purpose was served by the framers expressing a prohibition against each? Are we to conclude that the "deprivation" clause is a nullity? Appellees have read the "deprivation" clause out of the Fifth Amendment.

Passing beyond the above issue, we note Appellees' reliance on Norton v. McShane (1964), 332 F.2d 855. But Appellees ignore the fact that the Honorable Robert F. Kennedy, then Attorney General of the United States, filed his uncontradicted affidavit in the District Court describing the Defendants' discretionary duties, and reciting the fact that such duties were in enforcement of orders of the U.S. District Court and the U. S. Court of Appeals.

Please compare that with the facts of the case at bench. Here, the Appellees have never brought anything before the court showing in any way that they were acting within the scope of their discretion. Neither this Court nor the District Court nor Appellants have been told until this day what the Appellees' discretionary duties might be and whether Appellees were exercising their discretion in the case at bench. In the District Court Appellees simply asserted that they were immune

without offering any evidence as to their discretion. 2/ In this Court, by their Brief, Appellees ask this Court to presuppose that they were so acting (see AB, p. 4, Question 2). Nowhere in the record is there a slightest shred of evidence supporting the Appellees' presupposition.

On the contrary, there was before the District Court, and there is now before this Court, the article by Appellee Houghteling, admitting plainly and repeatedly that the Appellees exercise no discretionary function whatever as to passage of condemnation resolutions. As to the Appellees' suggestions in their Brief that such article merely indicates that the Commission is "overworked" and "understaffed", it is submitted that such suggestions fly in the face of Mr. Houghteling's own language:

"If the legislature and the people of California believe the Commission engages in much serious budget evaluation or that it directs the Division of Highways, let them no longer be deceived. What actually exists is a condition wherein the inmates run the asylum, with the Chief Inmate serving also as Chairman of the Board of Visitors." (Emphasis Mr. Houghteling's; p. 29 of Houghteling article).

"It's a puzzle to me why the agenda should be crowded with petty technical decisions, such as . . . condemnation resolutions . . . these are mainly routine matters. . . . " (p. 31 of Houghteling article).

Appellants respectfully submit that the above written and signed

2/ Please note that the trial court indicated that it would not even consider any showing that the Appellees in fact did not act within their discretion (see RT p. 25, line 20 through p. 26, line 6).

admissions of Appellee Houghteling, made voluntarily in the public press, are clear evidence of the fact that, whatever the theory may be, in fact and in practice the Appellees do not exercise any discretion as to passage of condemnation resolutions, but "routinely" do as told by the Division of Highways personnel.

Appellees suggest in their Brief that because of the "countless number of resolutions needed in this freeway oriented society", 3/ Appellees should in the name of "discretion" be permitted to "rubber stamp" such resolutions, assembly line fashion, with no thought, consideration, or discretion to be given to the individual resolutions. And if in a particular case the blow of the "rubber stamp" strikes some individual in an unlawful fashion thereby destroying the economic end product of a man's lifetime, that - argue the Appellees - is just too bad.

Thus, the Appellees' argument is self-contradictory. Discretion means the conscious exercise of judgment, a weighing, a thoughtful reaching of conclusions. But in the case at bench the Appellees claim an ex parte "discretion" which is blind to the facts, and calls for no consideration or weighing. In the end, the Appellees' claim of "discretion" offends not only established authority, but also the very meaning of the word.

3/ For all the utility of the seemingly ubiquitous freeways, Appellants express the fervent belief that our society has not yet been bulldozed into being "freeway oriented", whatever that means. In any event, it is submitted that our society's orientation toward the Constitution and the notion that all men are equal under the law, should be and is paramount, and more valid than any "freeway orientation".

Finally, it should be noted that Appellees address themselves only to the question of their supposed immunity under the Civil Rights Act, 42 U.S.C. §1983. Appellees completely overlook the fact that the instant case was brought also under authority of 28 U.S.C. §1331 which sustains U. S. District Court jurisdiction to deal with deprivations of rights by government officers. See Bell v. Hood (1946), 327 U.S. 678.

THE MOST RECENT AUTHORITY REJECTS
IMMUNITY OF STATE OFFICIALS IN FEDERAL
COURTS.

Earlier this year, the theory urged by the Appellees herein was considered in detail and squarely rejected. In reversing the decision of a District Court dismissing the action, the Circuit Court in Jobson v. Henne (1966, C.A.2nd), 355 F.2d 129, 133-134, held:

"Thus we reach the question whether these defendants by reason of their offices should be immune from the tort liability imposed by §1983. The Civil Rights Acts in general, and §1983 in particular, are cast in terms so broad as to suggest that in suits brought under these sections common law doctrines of immunity can never be a bar. Nevertheless, courts have narrowed the scope of these provisions by applying certain common law notions of official immunity from suit; it is now clear, for example, that the common law immunity from suit afforded legislative and judicial officers continues to have force in suits brought under the civil rights provisions. (Citation)

"It should be equally clear that both the language and the

purpose of the Civil Rights Acts are inconsistent with the application of common law notions of official immunity in all suits brought under these provisions. (Citation) In suits brought under §1983 an indispensable element of a plaintiff's case is a showing that the defendant (or defendants) acted 'under color of any statute, ordinance, regulation, custom of usage, of any state * * * .' 42 U.S.C. §1983. This test can rarely be satisfied in the case of anyone other than a state official. (Citation) To hold that all state officials in suits brought under §1983 enjoy an immunity similar to that they might enjoy in suits brought under state law 'would practically constitute a judicial repeal of the Civil Rights Acts.' (Citation) Furthermore, and perhaps more basically, the purpose of §1983 as well as the other Civil Rights provisions is to provide a federal remedy for the deprivation of federally guaranteed rights in order to enforce more perfectly federal limitations on unconstitutional state action. To hold all state officers immune from suit would very largely frustrate the salutary purpose of this provision. We conclude the defense of official immunity should be applied sparingly in suits brought under §1983. (Citation)" Jobson v. Henne, 355 F.2d at 133-134.

It should be noted that in Jobson the Second Circuit relied on the holding of this Court in Robichaud v. Ronan (1965, C.A. 9th), 351 F.2d 533, in which this Court, holding a prosecutor liable, stated at p. 536:

"Section 1983, first enacted in 1871, was intended to provide a remedy to persons subjected to '[m]isuse of power,

possessed by virtue of state law and made possible only because the wrong-doer is clothed with the authority of state law, * * * ' (citations). Thus, if immunities are broadly granted to state officers without consideration of the nature of their alleged misdeeds and the reason for the immunity, the statute becomes subject to circumvention, if not emasculation. "

The conclusion of this Court in Robichaud is particularly appropriate vis-a-vis the Appellees' presupposition of "discretion":

"The title of office, quasi-judicial or even judicial, does not, of itself, immunize the officer from responsibility for unlawful acts which cannot be said to constitute an integral part of judicial process. " Robichaud, supra, 351 F.2d at 537-538 (emphasis added).

In summary, three United States Courts of Appeals in three different Circuits, have recently examined the question of whether state officials are immune from the exercise of the judicial power of the United States in actions brought in federal courts under the Civil Rights Act. All three Circuits, including this one, agreed that the immunity possessed by legislators and judges does not extend to state administrative officials.

Jobson v. Henne (1966, C. A. 2nd), 355 F.2d 129, 133-134.

Robichaud v. Ronan (1965, C. A. 9th), 351 F.2d 533,

537-538.

Progress Development Corp. v. Mitchell (1961, C. A. 7th),

We respectfully submit that the above recent determinations of the U. S. Courts of Appeals, combined with a long established line of U. S. Supreme Court cases cited and quoted in Appellants' Opening Brief (pp. 14, 15, 16, A1 - A13), make it abundantly clear that the immunity sought by the Appellees herein simply does not exist.

APPELLEES ARE NOT LEGISLATORS AND CANNOT
CLAIM LEGISLATIVE PRIVILEGE

In order to squeeze themselves somehow within the rule of Tenney v. Brandhove, Appellees assert (AB 17 et seq.) that their acts are legislative in nature, and therefore they too should have the status of legislators.

To accomplish this remarkable result, Appellees raise an argument which upon examination collapses for reasons of both omission and commission. The omission has reference to Appellees ignoring of Article III, §1 of the California Constitution, the separation of powers provision, which expressly prohibits any person charged with the exercise of powers of one of the governmental departments from exercising any functions or pertaining to the other branches of government.

The Appellees are employees or officials of the Department of Public Works. They are therefore members of the executive department. They are not legislators, they have nothing to do with the

4/ Appellees seek in their brief (AB 12) to distinguish Mitchell by suggesting that the taking therein was not for public use. Such suggestion is incorrect. See Deerfield Park District v. Progress Development Corp. (1962), 26 Ill.2d 296, 186 N. E. 2d 360.

Calif. Water Code Appendix, §21-5) are possessed of the same immunity as members of the State Senate conducting a legislative investigation?

THE CONSTITUTION PROTECTS AGAINST DEPRIVATION OF RIGHTS AS WELL AS AGAINST PHYSICAL TAKING OF LAND

The Appellees argue that the only way in which a person can recover for injury to his property interests is by showing a physical taking or invasion of his land. The Appellees sneer at constitutional prohibition against deprivation by asserting that to seek protection against deprivation of rights as opposed to a taking, is to raise a "distinction without a difference".

Such argument of the Appellees flies in the face of the express language of the Fifth Amendment. But going beyond the language of the Constitution, the federal appellate reports abound in cases in which judicial redress was provided for deprivation of rights in the absence of any "taking".

For example, in Hornsby v. Allen (1964, C.A. 5th), 326 F.2d 605, and in Glicker v. Michigan Liquor Control Division (1947, C.A. 6th), 160 F.2d 96, nothing was "taken" from the Plaintiffs. The allegations in those cases were that the Plaintiffs were deprived of their right to secure liquor licenses. In both of the above cases the Plaintiffs prevailed.

In Lee v. Hodges (1963, C.A. 4th), 321 F.2d 480, nothing was "taken" from the Plaintiff. Instead, the Plaintiff was deprived of his right to use public school facilities on like terms with other members of the public, thereby causing the Plaintiff an economic injury.

In McGuire v. Sadler (1964, C.A. 5th), 337 F.2d 902, again nothing was "taken" from the Plaintiff. There the Plaintiff alleged that the Defendant government officials were attempting or threatening to deprive the Plaintiff of his rights in a parcel of land by selling such land.

Likewise in Marshall v. Sawyer (1962, C.A. 9th), 301 F.2d 639, there was no "taking", but a deprivation. To the same effect, Adams v. City of Park Ridge (1961, C.A. 7th), 293 F.2d 585.

But undoubtedly the best illustration of the distinction between a taking of land and deprivation of rights secured by the Constitution can be seen in Progress Development Corporation v. Mitchell (1961, C.A. 7th), 286 F.2d 222. In that case, the Plaintiffs' land was taken by eminent domain. For such taking there was a judicially determined payment of just compensation. See Deerfield Park Dist. v. Progress Development Corp. (1962), 26 Ill.2d 296, 186 N.E.2d 360. And yet, the Plaintiffs therein were also held entitled - entirely, separately and apart from the just compensation for the taking - to recover damages in federal court for the deprivation of their rights.

In short, Appellees' unsupported assertions notwithstanding, the Constitution protects against an uncompensated taking and it also protects against deprivation of one's rights. These are two distinct and separate matters.

Appellees seek to suggest to this Court that Appellants' Complaint is based upon a claim of damages arising from the mere passage of the condemnation resolution by the Defendants. The Appellees' suggestion is incorrect; it is a grand attack on a non-issue.

At no time did the Appellants claim that the mere passage of the

condemnation resolution gave rise to this action. To the contrary, Appellants expressly recognized that the normal period of time between the passage of a condemnation resolution and the institution of court proceedings may give rise to problems, which were not complained of (RT 22).

Appellants' position is that the condemnation resolution was not a real one; it was part of a bad faith scheme to prevent Appellants from using and developing their own land, so that when the State at some future time, decided to acquire what it did need and want, it would then be able to take Appellants' land cheaply, having first destroyed much of such land's value by freezing any use or development of such land.

The original condemnation resolution passed by Defendants was never implemented; it was never intended to be implemented. The condemnation proceeding, when it finally came in the State court under the prod of this action, was for a taking of only a small portion of the area described in the sham resolution.

In short, what the Appellees did, was not any normal or even slow institution of the condemnation proceedings against Appellants' property. What Appellees did was a scheme involving coercive threats, fraudulent misrepresentations, and the passage of a sham resolution which was never intended to be implemented. All this was done for the purpose of coercing Appellants into stopping construction of their shopping center. Thereby, Appellants were grievously damaged. Such damage, it is submitted, is a clear deprivation of Appellants' rights to use, enjoy, and develop their property without interference.

Land is worthless and useless if one cannot use it and develop it.

In the case at bench Appellants were prevented from using, enjoying, or developing their land by Appellees' fraudulent threats, and the bad faith resolution which was never implemented, nor intended to be implemented. Thereby Appellants were deprived of a property right. Such deprivation is violative of the Fifth and Fourteenth Amendments.

SOUND PUBLIC POLICY REJECTS IMMUNITY

Before addressing oneself to policy arguments with regard to immunity, it is helpful to restate just what the concept of immunity actually means. Please note that Appellees do not claim "privilege", which is what was established in Tenney. Appellees claim "immunity", a total imperviousness to the exercise of the judicial power of the United States. ^{6/} They say the federal courts are impotent to punish their admitted wrongdoing.

The Appellees' theory, stated simply, is that there walk among us men who, when acting under color of their office, are free to inflict injuries upon the person and property of others, and when called upon to answer for their deeds, can literally and figuratively thumb their noses at their victims, the courts, the law, and all other constituted authority.

^{6/} Appellees' statement (AB 5) that they do not seek to arrogate to themselves the divine rights of kings is quite wrong. This is exactly what they seek, and more. At least some monarchs felt subject to ecclesiastical authority (e. g. , see the 1077 A. D. trip of Henry IV, Holy Roman Emperor, in sackcloth and ashes, to Canossa to beg forgiveness of Pope Gregory VII). But Appellees herein want for themselves a total immunity, with no one to answer to.

It is submitted that the Appellees' theory offends reason and outrages the most rudimentary notion of justice.

To be sure, Appellants, recognizing the harsh reality of life, do not deny that privilege exists in our society. Indeed, the United States Constitution expressly grants a privilege from process to members of the Congress. By analogy, such privilege has been judicially extended to members of State Legislatures.

Recognizing all of the above, the question is - just how far into the hierarchy of state government does this privilege descend? It must be recognized as a fact of life that state governments have been, within the recent past, undergoing explosive growth. The states and their various agencies and subdivisions have proliferated to the point where thousands of men with impressive titles sit in well-appointed offices from which they wield segments of the state power. Are all these men free to ride roughshod over their fellow citizens, with no remedy to be had?

The answer, it is submitted, must be and indeed has been in the negative. Purely on policy grounds, to grant to the ever-growing numbers of state officials the "immunity" argued for by the Appellees herein, would be to create a kind of aristocracy, placed above the citizenry, without standards for their conduct, and unchecked in their acts by man, government or law.

But more than policy requires that such "immunity" be rejected. The Federal Constitution and laws enacted by the Congress expressly place limitations on the States. The Constitution by Article VI thereof, declares itself and the laws of the United States to be the supreme law

of the land. One is, therefore, forced to return to the inescapable conclusion that if appointed, privileged members of state agencies can disregard the Constitution and the laws of the United States passed by Congress, and then hide behind their "immunity", then undisputably the Constitution, the courts and the laws of the United States are relegated to a subordinate position, with the will or "discretion" of a state official supreme. Such result has been repeatedly rejected by the United States Supreme Court. Appellants respectfully submit that such result is not only unacceptable legally, but is intolerable in a nation which prides itself on equality of men under law.

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court."

Marbury v. Madison (1803) (U.S.), 1 Cranch 137, 163.

The Appellees make their own policy arguments and say that it will not do to have state officials "harassed" by litigation. ^{7/} But manifestly, this argument applies to every person, not just state employees. Any person can find himself a defendant in an unjustified lawsuit. And if the lawsuit is indeed unjustified, it is a simple matter to dispose of it.

^{7/} In this connection please note that should Appellees be ultimately found liable herein, they will not have to pay the judgment out of their own resources. Inasmuch as Appellees are being defended by a state public entity (see RT 36), such entity has voluntarily elected to pay the judgment (see §825 California Government Code).

All of us bear this risk. Surely Appellees cannot contend that each action or decision of a state highway commissioner or right-of-way agent is fraught with such significance and far-reaching effect as to transcend the compelling principle that each man is answerable for his acts. This point is best seen when one recalls that in the boardrooms of major corporations, decisions are frequently made of great impact on the country. For example, pricing decisions in the basic industries, such as steel or automobiles, can easily set off economic forces with highly beneficial or destructive consequences to the entire country. And yet the men who make these decisions - the corporate directors - are answerable to the law for their misdeeds, if any there be.

"Administrative time is probably not yet deemed to be uniformly so precious as to preclude even the drain thereon that would be necessitated by the defense of substantial and successful suits; and for the time so lost the public may well find its compensation in the added incentive to administrative integrity and the exercise of due care and diligence in the first instance."

21 Minn. Law Review 306.

Some of the policy arguments urged by the Appellees suggest that privilege must be granted to state officials so that vexatious suits will not be brought against them along with well-founded ones. ^{8/} Such argument asks this Court to proverbially "throw out the baby with the bath water". Surely, our society can entrust to its judiciary the task of

^{8/} Such arguments have been termed by writers "an amorphous mass of cumbrous language". 29 N. Y. U. L. R. 1363-1364; 36 Wash. L. R. 313-314.

separating the wheat from the chaff, of throwing the unfounded lawsuits out of court and allowing the valid ones to proceed on the merits.

In the end, our society, can only benefit from the rule that all of its members, regardless of their position, are bound by the law. Appellants submit that it is no overstatement to say that in any society the supremacy of law over unbridled and unredressed misdeeds of individuals can be summed up in one word - civilization.

CONCLUSION

Appellants submit that the District Court herein erred when it dismissed Appellants' Complaint. In applying the immunity doctrine, the District Court not only lacked precedent upon which to sustain its ruling, but proceeded directly contrary to authority. The U. S. Supreme Court and U. S. Court of Appeals cases cited and discussed in Appellants' briefs herein make it abundantly clear that as to state officials, liability is the rule; privilege is the rare exception. The privilege carved out by the U.S. Supreme Court for state legislators engaged in an intra-legislative activity in Tenney v. Brandhove was carefully circumscribed by the Supreme Court which made it clear that the privilege there was a narrow one, applicable only to that case.

Appellees seek in this case an explosive expansion of privilege. They seek to convert the carefully circumscribed privilege of legislators into an absolute immunity of a multitude of state officials and employees. Precedent and sound public policy compel the conclusion that Appellees' theory lacks merit and should be rejected.

Going beyond the issue of immunity, Appellees seek to convince

this Court that when a state official acting under the color of his office, and using the color of that office as a tool makes threatening, coercive, and fraudulent misrepresentations to a citizen, thereby preventing that citizen from using, enjoying, and developing his land, that no constitutional rights have been violated. Again, Appellees' suggestion lacks merit. Land that cannot be used is valueless. And clearly, one can be prevented from using one's land by threats just as effectively as by physical acts. Restatement of Torts, in commenting on §767, states at page 66:

"Litigation and the threat of litigation are powerful weapons. When improperly instituted, litigation entails harmful consequences to the public interest and judicial administration as well as the act or adversary. The use of these weapons of inducement is ordinarily unprivileged if the actor has no belief in the merit of the litigation or if, though having some belief in its merits he nevertheless institutes or threatens to institute litigation in bad faith. . . . "

The above words of the Restatement describe the actions of Appellee Pedley to perfection. He knew that litigation could not be instituted when he made his threats. His means were tortious; his object an unconstitutional deprivation of Appellants' property rights.

The above reference to Pedley's acts, brings to mind the fact that it is conceded that neither Pedley nor Erreca are members of the Highway Commission, and, therefore even under the District Court's ruling not entitled to be shielded by the immunity claimed by the Appellees.

One final point should be touched on before concluding. What of justice? The briefs herein speak of rules of law, precedents and policy, and, yet, perhaps that is not enough. Appellants submit that ultimately, in a civilized society, men come to courts and stand before judges in a quest for justice. But admittedly, no justice was done in the case at bench. This was expressly recognized by the District Court (RT 34):

"THE COURT: . . . I am telling you, again, it is because I don't think I have the power to act; that is the reason. If I thought -- I wish I did have the power. I wish I could rule in your favor because I can sense as clearly as you can the injustice of these situations and I would welcome a reversal in this case."

Thus, the trial court felt itself somehow powerless to do justice. One is therefore reminded of the words of Mr. Justice Cardozo:

"Judges march at times to pitiless conclusions under the prod of a remorseless logic which is supposed to leave them no alternative. They deplore the sacrificial rite. They perform it nonetheless, with averted gaze, convinced as they plunge the knife that they obey the bidding of their office. The victim is offered up to the Gods of Jurisprudence on the altar of regularity. . . . I suspect that many of these sacrifices would have been discovered to be needless if a sounder analysis of the growth of law, a deeper and truer comprehension of its methods, had opened the priestly ears to the call of other voices."

Cardozo, The Growth of the Law (1924), page 66.

This Court has been confronted with a wrong which Appellants ask to be righted. Appellants look to the courts as a place where merits of controversies are to be weighed and judged; a place where no man by virtue of his status or power can arrest the dispensation of even-handed justice.

Appellants respectfully urge this Court that it reverse the Order of the U. S. District Court, appealed from.

Respectfully submitted,

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Attorneys for Appellants

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gideon Kanner

GIDEON KANNER

No. 21161 ✓

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

REDERI A/B NORDSTJERNAN, etc.,
aka JOHNSON LINE,

Appellant,

vs.

CRESCENT WHARF & WAREHOUSE CO.,

Appellee.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

**OPENING BRIEF OF APPELLANT
REDERI A/B NORDSTJERNAN**

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SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

**OPENING BRIEF OF APPELLANT
REDERI A/B NORDSTJERNAN**

**STATEMENT OF PLEADINGS AND
JURISDICTIONAL FACTS**

Adolf Bojorquez, a longshoreman, was injured on November 27, 1963, aboard the M.S. ROSARIO, a cargo vessel owned by Rederi A/B Nordstjernan (hereinafter called the shipowner). Bojorquez sought recovery from the shipowner on theories of negligence and unseaworthiness [C.2]. The shipowner denied liability [C.8] and impleaded plaintiff's employer, Crescent Wharf & Warehouse Company (hereafter called the

stevedore company), seeking full indemnity against any liability to Bojorquez [C.16]. The stevedore company denied responsibility [C.26]. Jurisdiction was invoked under the diversity rules [28 U.S.C.A. 1332]. Bojorquez is a citizen of the State of California, and the shipowner is a Swedish corporation [C.2]. Jurisdiction over the Third-Party Complaint concerns a dispute ancillary and incidental to the principal action.

The case was submitted to a jury which returned a verdict of \$20,000 for Bojorquez against the shipowner, and denied indemnity. The shipowner appeals from the judgment entered in favor of the stevedore company.

The jurisdiction of this court rests under 28 U.S.C.A. 1291, notice of appeal having been filed within the time provided by 28 U.S.C.A. 2107 [C.35].

STATEMENT OF THE CASE

There is little dispute about the circumstances of this accident. Bojorquez, a longshoreman, was employed by the stevedore company and was assigned by it on November 27, 1963 to assist in the discharge of cargo from #5 starboard lower hold of the M.S. ROSARIO. [Rep. Tr. p. 49, lines 12-16].

The description of #5 lower hold in the following paragraphs will be more meaningful if the exhibit photographs and diagrams are examined. The starboard portion was 44' long, 29' wide and ran fore and aft between the vessel's propeller shaft and the starboard skin of the ship. The shaft was enclosed in a housing which protruded into the space along the port side; this housing was about 6' wide and 7' high and, being completely

enclosed, resembled a shelf along the port side of the tank. A similar housing along the starboard side enclosed one of the ship's fuel tanks. It, too, formed a shelf. The area between the shelves is called the well. An overhead opening in the hatch was situated at about the fore and aft midpoint, through which cargo could be loaded and discharged.

Rolls of newsprint weighing 1600 pounds apiece were stowed in the after half of the deep tank [Rep. Tr. p. 57, line 18]. These rolls were cylindrically shaped, each approximately 4' in diameter and 5' in height [Rep. Tr. p. 52, lines 18-19]. Some rolls were stowed on deck between the shelves in the well [Rep. Tr. p. 52, line 22-24]. On top of these rolls a smooth wooden flooring had been placed [Rep. Tr. p. 52, lines 20-21], the top of that flooring being approximately 2½' below the shelves that ran along both sides of the space [Rep. Tr. p. 58, lines 3-5]. Other newsprint rolls were stowed on end on top of the well's wooden flooring and the shelves [Rep. Tr. p. 52, lines 10-16 and p. 58, lines 11-21]. All rolls were to be discharged at Los Angeles.

When the M.S. ROSARIO arrived at Los Angeles, the stevedore company undertook to discharge the vessel. Overall supervision was directed by stevedore company's superintendent, Ralph W. Mann, [Rep. Tr. p. 137, lines 13-17]. He was assisted by two other stevedore company supervisory employees, the ship boss Al Geere and the hatch boss Tom A. Hendriksen [Rep. Tr. p. 137, lines 13-24]. The methods of discharging were selected solely by the stevedore company, which did not consult the shipowner about any phase of the operation [Rep. Tr. p. 137, line 25, through p. 139, line 3]. None of the

shipowner's employees were present or participated in any way in the discharge activities [Rep. Tr. p. 119, lines 20-25].

The stevedore company first discharged the rolls standing on end in the well down to the level of the wooden flooring, some 2½' below the shelves. Then the stevedore company superintendent, ship boss and hatch boss stopped the cargo discharge operation and inspected the remaining rolls [Rep. Tr. p. 138, lines 6-23]. The three men decided, at the conclusion of their conference, to discharge next the rolls stowed on end on the shelves with "frisco pullers" [Rep. Tr. p. 62, lines 8-17]. This device is used to "break" rolls standing on end over onto their rounded sides so that the rolls may be rolled on their round sides forward in the hold to the area directly beneath the hatch opening overhead from which point the ship's winches could hoist the rolls up and out of the hold. A "frisco puller" consists of several fixed hooks which can be clasped against the top of a roll. Several lines 10' - 12' long are secured to it and the longshoremen, by pulling on the lines, can cause the heavy roll to topple off its end and over onto its rounded side [Rep. Tr. p. 62, line 18, through p. 63, line 9].

When the stevedore superintendent, Ralph Mann, decided to use "frisco pullers", he intended that the longshoremen would stand on a shelf and break over the rolls onto the same shelf [Rep. Tr. p. 169, line 23, through p. 170, line 5]. He considered this to be the proper and logical method [Rep. Tr. p. 170, lines 13-22]. He did not intend that the men stand in the well beneath the rolls and pull from that position as this would cause the heavy rolls to fall off the shelf and endanger the men standing

in the well. On the basis of his 37 years in the stevedore business, and 20 years as a superintendent, Mr. Mann believed standing and pulling in the well was “dangerous” and he “wouldn’t consider” doing it [Rep. Tr. p. 70, line 23 through p. 171, line 4; p. 165, line 19 through p. 166, line 1]. Mr. Mann failed, nevertheless, to instruct the hatch boss, Mr. Hendriksen, and the longshoremen they should not stand in the well [Rep. Tr. p. 163, lines 9-12].

After the stevedore superintendent and ship boss departed from the area, Mr. Hendriksen allowed his longshoremen, including Bojorquez, to do precisely what Mr. Mann had not intended, i.e., to stand in the well beneath the heavy rolls and pull on the lines of the frisco pullers until the roll toppled off the shelf and fell into the well [Rep. Tr. p. 67, line 19, through p. 68, line 2]. Tom Hendriksen told the longshoremen that when a roll started to topple, they should drop their lines and run forward in the well to get away from the falling roll [Rep. Tr. p. 70, lines 10-18]. Bojorquez and his partner, who were assigned to pull on the line at the after or closed end of the hold, were expected to run forward directly beneath the toppling roll, and do so with split second timing between the moment when the roll started to topple off the shelf and the moment it crashed into the well [Rep. Tr. p. 218, lines 18-23]. Tom Hendriksen knew at the time that rolls of newsprint frequently bounce in an unpredictable manner when they fall to the deck [Rep. Tr. p. 212, lines 7-11], and that this further multiplied the danger [Rep. Tr. p. 215, lines 17-20].

Bojorquez and the other longshoremen complained at the outset to hatch boss Tom Hendriksen that standing in

the well was unsafe and that someone could be maimed by a toppling roll [Rep. Tr. p. 63, lines 10-22]. The hatch boss conceded it was “hazardous” [Rep. Tr. p. 200, lines 22-25], but advised the longshoremen he would watch the rolls until they started to topple and would shout to them when to drop their lines and run [Rep. Tr. p. 219, lines 11-17]. Having no other alternative except to work as directed, the longshoremen discharged two or three rolls [Rep. Tr. p. 74, lines 14-19]. Then the hatch boss, Tom Hendriksen, left the hold, as it was near quitting time and he wanted to do some paper work ashore [Rep. Tr. p. 211, lines 2-6]. When he left there was no one to supervise the discharge job or to shout a warning when the rolls started to topple.

The longshoremen then attempted to discharge another roll in his absence. As the next roll was pulled off the shelf, it toppled into the well as intended, but struck the plaintiff as he tried to run beneath it [Rep. Tr. p. 74, lines 14-25]. Plaintiff was injured, in other words, in precisely the way he had feared [Rep. Tr. p. 118, lines 7-9]. When the stevedore superintendent, Mr. Mann, later discovered the men had been standing in the well, contrary to his intention, he declared he would have stopped them from doing this had he known about it [Rep. Tr. p. 17, lines 5-7]. Unfortunately, he did not know and had not checked to see if the longshoremen were observing proper safety practices.

At no time during the discharge operation were the ship's officers consulted about the method to be used [Rep. Tr. p. 137, line 25 through p. 138, line 2]. The method was selected solely by the stevedore company [Rep. Tr. p. 207, lines 3-7]. At no time was a ship's

officer present in the hold nor did the shipowner have knowledge the stevedore company was using this admittedly dangerous and improper method [Rep. Tr. p. 119, lines 20-24; p. 138, line 25 through p. 139, line 3].

Subsequently, at the trial, the Court gave the following instruction among others requested by plaintiff:

“If the cargo can be discharged with reasonable safety only by conducting the discharge in a certain manner, or after observing certain precautions, and it is discharged in a different manner, or without observing such precautions, involving unreasonable risk of harm to the longshoremen, the vessel is thereby rendered unseaworthy.” [Rep. Tr. p. 241, line 24, through p. 242, line 5.]

The jury thereafter retired to deliberate and later returned a verdict for the plaintiff against the shipowner, but denied the shipowner indemnity from the stevedore company.

SPECIFICATION OF ERRORS

1. The Court erred in giving the stevedore company's fifth proposed instruction, as follows:

“If you should find that the vessel or its cargo was in such condition that the stevedore was prevented or seriously handicapped in its ability to discharge the vessel in a workmanlike manner and with reasonable safety, then the shipowner is in fact precluded from recovering from the stevedore company.” [Rep. Tr. p. 259, line 24, to p. 260, line 4]

The shipowner objected at the trial to this instruction [Rep. Tr. p. 295, lines 12-16].

2. The Court erred in denying the shipowner's motion for a directed verdict against the stevedore company [Rep. Tr. p. 294, lines 6-18], and in denying the shipowner's motion for judgment notwithstanding the verdict [Rep. Tr. pp. 306-309; Cl. Tr. p. 31].

ARGUMENT OF THE CASE

I

THE COURT ERRED IN GIVING THE STEVEDORE COMPANY'S FIFTH PROPOSED INSTRUCTION THAT THE SHIPOWNER WAS PRECLUDED FROM RECOVERING INDEMNITY IF THE CARGO WAS IN SUCH CONDITION THAT THE STEVEDORE COMPANY WAS HANDICAPPED IN ITS ABILITY TO SAFELY DISCHARGE THE SHIP.

Plaintiff's accident was not caused by any dangerous condition of the cargo which seriously handicapped the stevedore company. Plaintiff's accident was caused by the inexcusable failure of the stevedore company employees to use the logical method of discharge selected by its superintendent, Mr. Mann. The giving of this instruction was error because there was no evidence on which it could be based.

The giving of the instruction was error, moreover, because the instruction clearly misstated the law. It is settled that creation of a dangerous condition by the shipowner does not preclude indemnity. In *Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423, 3 L.Ed.2d 413, 79 S.Ct. 445 (1959), the shipowner negligently created an unsafe condition by setting a cut-off switch at twice

the safe working load. The stevedore company was held liable, nevertheless, because its careless handling of the boom “brought into play” the dangerous condition created by the shipowner. The shipowner’s conduct in creating the condition did not preclude indemnity.

In *Waterman S. S. Corp. v. Dugan & McNamara*, 346 U.S. 421, 5 L.Ed.2d 169, 81 S.Ct. 200 (1960), the vessel permitted a stevedore company to stow bags of sugar in an unseaworthy manner. At the next port a longshoreman was injured while discharging those bags. In the shipowner’s action for indemnity, against the discharging stevedore company, the Court held the stevedore company liable because it brought the unsafe condition of the stow into play. The fact that the shipowner initially permitted the bags to be stowed in an unseaworthy manner did not preclude indemnity.

In *Matson Terminals, Inc. v. Caldwell*, 354 F.2d 681 (9th Cir. 1965), where a longshoreman was injured by defective winches supplied by the shipowner, the Court granted the shipowner indemnity and stated:

“Under the stevedoring contract, Sea-Land agreed to supply adequate winches in good working order. It failed to do so. However, Matson discovered that the winches were not in good working order immediately upon commencement of its stevedoring operations and several days prior to the occurrence which caused injury to Caldwell. At the time that Matson discovered and became aware of the malfunctioning of the winches, *it can hardly be asserted that Sea-Land’s failure to supply winches in good working order constituted such a material breach of*

the stevedoring contract, or of such conduct on the part of Sea-Land, as to preclude it from enforcing the contract to recover indemnity. . . . Upon discovery of the unsatisfactory condition, Matson was obligated to call such condition to the attention of Sea-Land and obtain acknowledgment thereof. Conceivably, the unsatisfactory condition of the winches would have justified Matson in discontinuing its stevedoring operations, which were hazardous, until Sea-Land had remedied the defect. DeGioia v. United States Line Company, 304 F.2d 421, 424 (2nd Cir. 1962); Simpson v. Royal Rotterdam Lloyd, 225 F.Supp. 947, 952 (S.D.N.Y. 1964)." (italics supplied)

Other opinions are quoted at length in Appendix B to this brief.

In view of the authorities discussed above, it is clear that, even if the shipowner permitted the cargo to be stowed improperly, such conduct by the shipowner does not as a matter of law preclude indemnity because the stevedore company had actual knowledge of the stow's condition and failed to stop work or notify the shipowner of the problem, and instead used a method of discharge everyone considered foolhardy and thereby injured plaintiff.

Prejudice from an erroneous instruction could not be better proved. The Stevedore Company's entire defense rested on this instruction, as is apparent in counsel's closing argument. Counsel read and emphasized this instruction to the jury no less than four times [Rep. Tr. p. 285, lines 9-16; p. 286, lines 1-5; p. 287, lines 18-25; p. 288, lines 17-23].

II

THE TRIAL COURT ERRED IN DENYING THE SHIPOWNER'S MOTIONS FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT WHERE THE STEVEDORE COMPANY DISCHARGED THE ROLLS OF NEWS-PRINT IN AN ADMITTEDLY IMPROPER MANNER AND THEREBY CAUSED PLAINTIFF TO BE SERIOUSLY INJURED.

A. Motions For Directed Verdict And Judgment Notwithstanding the Verdict Should be Granted Where There Can Be But One Reasonable Conclusion As to the Proper Verdict.

In Brady v. Southern R. Co., 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943), the Supreme Court held that, where the evidence is such that without weighing the credibility of the witnesses, there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or judgment notwithstanding the verdict.

B. The Only Reasonable Conclusion to be Drawn is That the Stevedore Company Breached its Warranty of Workmanlike Service in Failing to Safely and Properly Discharge the Rolls of Newsprint.

Uncontradicted evidence proved the stevedore company breached its warranty of workmanlike service in at least these matters:

- 1) It failed to stop work when it became aware of a dangerous work condition.

- 2) It failed to notify the shipowner of a potentially dangerous work condition.
- 3) It failed to remedy the dangerous condition or take any steps for the safety of the longshoremen.
- 4) Its superintendent, Mr. Mann, failed to tell the longshoremen they should stand on the shelf, as he intended, while breaking over the rolls.
- 5) Its superintendent failed to observe the operation to ascertain whether safety practices and his instructions were being followed.
- 6) It used a grossly unsafe method of discharge, instead of the method intended by its superintendent.
- 7) Its hatch boss, Mr. Hendriksen, deserted his post in the middle of a hazardous operation and was not present at the time of the accident to shout the necessary warning to plaintiff.

The stevedore company's faults were so gross that its counsel conceded the stevedore company has breached its warranty of workmanlike service [Rep. Tr. p. 281, p. 18 to p. 282, line 2]. Accordingly, the stevedore company's fault was judicially settled.

C. The Shipowner Participated in No Way in the Discharge Operation and Was Not Guilty of Any Conduct Sufficient to Preclude Indemnity.

The stevedore company was in sole and complete charge of the unloading operation. The method of discharge of the rolls was selected by the stevedore company without notice to the shipowner. Indeed, the shipowner was neither consulted nor advised about any phase of

the discharge operation. At no time relevant hereto were any of the ship's crew present.

The stevedore company contended, at the trial, that the shipowner permitted the rolls to be stowed in a manner that handicapped it and, ipso facto, the shipowner was precluded from recovering indemnity. Assuming arguendo the stevedore company correctly interpreted the authorities (which the shipowner denies) the shipowner is still entitled to a directed verdict or judgment notwithstanding the verdict. This is because the uncontradicted evidence proved the stevedore company had full and complete knowledge of the stowage prior to the accident and willingly elected, without consulting or advising the shipowner, to proceed with the discharge in a dangerous and improper manner. In so doing, the stevedore company waived any possible breach of duty by the shipowner. As District Judge Mathes held in *Hugev v. Dampskisaktieselskabet International*, 170 F. Supp. 601, 611 (S.D.Cal. 1959):

“Furthermore, if it were assumed arguendo that the misplaced ‘queen beam’ was a breach by the shipowner, the stevedoring contractor was fully aware of this latent condition prior to plaintiff’s injury and nonetheless willingly proceeded with the work despite the known dangerous condition, and hence would be held to have waived the condition. Restatement, Contracts, 297, 294 (1932); See *American President Lines v. Marine Terminals Corp.*, supra, 234 F. 2d at page 759; CF. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Co.*, supra, 350 U.S. at pages 134-135, 76 S. Ct. at pages 237-238.”

See also *Metropolitan Stevedore Company v. Dampskisaktieselskabet International*, 274 F. 2d 875, 876-7 (9th Cir. 1960), cert. den. 363 U.S. 803, 4 L.Ed.2d 1147, 80 S. Ct. 1237; and *Weigel v. The M/V BELGRANO*, 188 F. Supp. 605, 610-11 (D.C. Ore. 1960).

Moreover, there was no evidence the shipowner prevented or seriously handicapped the stevedore company from performing in a workmanlike manner. The stevedore company is obliged by its warranty to stop work whenever it encounters an unsafe condition. See *Matson Terminals, Inc. v. Caldwell*, supra; *American President Lines, Ltd. v. Marine Terminals Corp.*, 234 F.2d 753 (9th Cir. 1956), cert. den. 352 U.S. 926, 1 L.Ed.2d 161, 77 S.Ct. 222; *Nicroli v. Den Norske Afrika*, 332 F.2d 651 (2nd Cir. 1964). The shipowner did nothing to prevent or handicap the stevedore company in performing its duty to stop work or, thereby, to perform in a workmanlike manner.

III

CONCLUSION

As between the shipowner and the stevedore company, the party in the best position to prevent the longshoreman's accident will be made to bear the financial burden of his injuries. See *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 11 L.Ed.2d 732, 84 S.Ct. 748 (1964).

Stevedore companies represent themselves to be expert and experienced in the work of unloading cargo. They know cargo has been loaded by stevedores of varying degrees of competency around the world and that there

may be unsafe conditions related to discharging the cargo. The stevedore company holds itself out as being trained and equipped to cope with these conditions and dangers. To this end, the stevedoring company is given full use and charge of the ship's unloading equipment and the cargo hatches and holds. If any condition is found which is unsafe for longshoremen, the stevedore company may remedy it at the expense of the shipowner and, if stevedoring operations are thereby delayed, the shipowner normally must pay for standby time. *Hugev v. Dampskisaktieselskabet International*, supra.

This expert stevedore proceeded, in violation of its superintendent's intentions, to use a method everyone instantly recognized as highly hazardous and, in so doing, caused plaintiff's injuries. If the stevedore company had only stopped work, as it should have done, or if it had used a safe method of discharge, as it should have done, plaintiff would not have been injured.

Safety in the longshore industry will be encouraged only if the stevedore company willingly bears the burden of proceeding in the face of obvious danger. *Pacific Far East Line v. California Stevedore & Ballast Co.*, 238 F. Supp. 956 at 959 (N.D.Cal. 1965). (See Appendix B, p. iv.)

In view of the uncontradicted evidence of the stevedore company's gross fault, the shipowner was entitled to a directed verdict and judgment nil obstat verdicto. The shipowner would be entitled to a new trial under proper instructions if there was any doubt as to the proper verdict but where, as here, the evidence and applicable law proves the stevedore company breached its

warranty and the shipowner was not guilty of conduct sufficient to preclude indemnity, the judgment of the trial court should be reversed and judgment entered for the shipowner.

Respectfully submitted,

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GORDON K. WRIGHT
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APPENDIX A

Table of Plaintiff's and Defendant's Exhibits

<u>Plaintiff's Exhibits</u>	<u>Identified</u>	<u>Offered</u>	<u>Rec'd./Rej.</u>
#1 Diagram of "cat sole"	p. 59	p. 270	Rec'd p. 270
#2 Diagram of #5 deep tank	p. 76	p. 270	Rec'd p. 270
#5 Earnings record	p. 132	p. 132	Rec'd p. 132
#6 Recent earnings record	p. 132	p. 132	Rec'd p. 132
#7 Wage increases	p. 133	p. 133	Rec'd p. 133
#8 Medical records	p. 226	p. 227	Rec'd p. 227
 <u>Defendant's Exhibits</u>			
A Diagram of ship	p. 106	p. 270	Rec'd p. 270
B Cargo plan	p. 203-4	p. 270	Rec'd p. 270
C Hatch log	p. 110, p. 140-1	p. 110	Rec'd p. 111
D Diagram	p. 144	p. 154	Rec'd p. 154
E Diagram	p. 154-7	p. 157	Rec'd p. 157



APPENDIX B

In *Simpson v. Royal Rotterdam Lloyd*, 225 F.Supp. 947, 951-3 (S.D.N.Y. 1964), the shipowner permitted a cargo of tin ingots, improperly coated with grease, to be loaded. The discharging stevedore company knew the ingots were dangerous but proceeded with the work until one of its employees was injured. In allowing the shipowner to recover indemnity, the Court stated:

“I conclude that Stevedore in this case breached its obligation to Shipowner to perform its services in a workmanlike manner . . . once a stevedore has knowledge of an unsafe condition, there is an obligation upon the stevedore to either remedy the condition or to cause the ship to do so. *Tedeschi v. Luckenbach S.S. Co.*, 324 F.2d 628, 2 Cir., 1963; *Caputo v. United States Lines Co.*, 311 F.2d 413, 415 (2 Cir.), cert. denied, *Imparato Stevedoring Corp. v. United States Lines Co.*, 374 U.S. 833, 83 S.Ct. 1871, 10 L.Ed.2d 1055 (1963); *Drago v. A/S Inger*, supra; *DeGioia v. United States Lines Co.*, 304 F.2d 421, 424 (2 Cir. 1962); *Misurella v. Isthmian Lines, Inc.*, 214 F.Supp. 857, 863 (S.D.N.Y. 1963), appeal docketed, No. 28350, 2 Cir., July 12, 1963; *Nicroli v. Den Norske Afrika-OG Australielinie Wilhelmsens Dampskibs-Aktieselskab*, 210 F.Supp. 93, 97 (S.D.N.Y. 1962). This obligation of a stevedore includes ordinarily the duty not to continue work until a known dangerous condition has been made reasonably safe. *Caputo v. United States Lines Co.*, supra; *United States v. Arrow Stevedoring Co.*, 175 F.2d 329, 331 (9 Cir.), cert. denied, 338 U.S. 904, 70 S.Ct. 307, 94 L.Ed. 557 (1949); *Misurella Compania Anonima Vene-*

zolana De Navegacion, 1962 A.M.C. 1347, 1351 (S.D.N.Y.); *Nicroli v. Den Norske Afrika-OG Australielinie Wilhelmsens Dampskibs-Aktieselskab*, supra; *Hugev v. Dampskisaktieselskabet Int'l.*, 170 F.Supp. 601, 608 (S.D.Cal. 1959), aff'd. sub nom., *Metropolitan Stevedore Co. v. Dampskisaktieselskabet Int'l.*, 274 F.2d 875 (9 Cir.), cert. denied, 363 U.S. 803, 80 S.Ct. 1237, 4 L.Ed.2d 1147 (1960); *Revel v. American Export Lines, Inc.*, 162 F. Supp. 279, (E.D.Va. 1958), aff'd. 266 F.2d 82 (4 Cir. 1959).

"Tin ingots covered with grease constitute a danger to the longshoremen who are to unload them. Stevedore, through its hatch boss, had actual knowledge of the dangerous condition. Stevedore breached its obligation to perform a workmanlike job by continuing to unload the cargo in the condition it was in. Merely showing the unsafe condition to the ship's officer was not sufficient to discharge the obligation of the Stevedore, unless the condition was remedied. Wiping the tops of the ingots with rags already greasy and cautionary words by the hatch boss to the men to be careful and by the men to each other do not discharge the obligation of the stevedore to the Shipowner."

In *Nordeutscher Lloyd, Brennan v. Brady-Hamilton Steve. Co.*, 195 F.Supp. 680 (D.C. Ore. 1961), the shipowner had permitted heavy crates of glass to be stowed improperly, and a longshoreman was injured during the difficult discharge. In allowing the shipowner to recover indemnity, from the discharging stevedoring company, the Court said:

“The respondent’s duty under its contract with the libelant included the duty to suspend the loading or unloading operation of its own initiative and thus avoid injury or damage whenever it realized that it would be unsafe to proceed. *United States v. Arrow Stevedoring Co.*, 9 Cir. 1949, 175 F.2d 329, certiorari denied 338 U.S. 904, 70 S.Ct. 307, 94 L.Ed. 557. The warranty of seaworthiness raised in favor of the shipper of cargo and extended to seamen and longshoremen, *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, does not extend to the stevedoring contractor. *Crumady v. The JOACHIM HENDRIK FISSER*, 1959, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413. It is said that such a contractor represents himself to be, and is assumed to be, expert and experienced in the work of loading and unloading cargo, while the individual longshoreman may or may not be so qualified. *Hugev v. Dampskisaktieselskabet*, D.C.S.D. Cal. 1959, 170 F.Supp. 601.

“There is a definite duty on the part of the stevedore to call to the attention of the ship’s officers all unseaworthy conditions and to stop all operations when it appears that to proceed would be unsafe. *Revel v. American Export Lines*, E.D.Va. 1958, 162 F.Supp. 279, 281, affirmed *American Export Lines v. Revel*, 4 Cir., 266 F.2d 82; *United States v. Arrow Stevedoring Co.*, *supra*.”

“The evidence is clear that the stowage of the crates of glass on the bundles of pipe was improper, that respondent had notice of the dangerous place in

which Ough and his fellow workmen were compelled to work and that nothing worthwhile was done to protect the men from the hazards of unloading this dangerous cargo.

“Mowrey, respondent’s hatch boss, testified this was one of the worst stows of glass he had ever seen. It was so bad he reported it to the walking boss, the head employee of respondent, and told him that the stowage was an awful mess. The walking boss agreed and told the hatch boss to do what he could with it.

“On an examination of all of the evidence in this case, observed in light of the foregoing authorities, I find substantial evidence that respondent breached its stevedoring contract with libelant in failing to discharge said cargo in a safe and proper manner and in negligently performing such contract in each of the particulars as charged by libelant.

“I further find that the discharge of the cargo and the manner in which the discharge was handled were entirely within the control of respondents. There is no evidence that the libelant breached or failed to perform any duty which it owes to respondent.”

(underlining supplied)

In *Pacific Far East Line v. California Stevedore & Ballast Co.*, 238 F.Supp. 956 (N.D.Cal. 1965), at page 959 the Court said:

“The possibility of indemnity over against it by the shipowner will cause a stevedore company to hesitate before risking its crew in an unsafe, unsea-

worthy condition — as it might do if it could do so with impunity. Presumably a shipowner, even one whose ship in some respects subjects it to an absolute liability for unseaworthiness, would prefer that work be stopped rather than the condition be “brought into play” by the stevedore company to the injury of a worker. The stevedore company’s warranty of proper workmanship is broad enough to imply that it will not proceed in the face of a known, dangerous condition. Its clear obligation is to either remedy the condition, or have the ship remedy it, or, if necessary, refuse to subject workers to the risk of injury — an obligation analogous to the obligation to exercise the “last clear chance” as recognized by the law of torts.”

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 & 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Francis J. MacLaughlin

No. 21161
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

REDERI A/B NORDSTJERNAN, etc., aka JOHNSON LINE,
Appellant,

vs.

CRESCENT WHARF & WAREHOUSE Co.,
Appellee.

Appeal From the United States District Court, Southern
District of California, Central Division.

APPELLEE'S BRIEF.

FILED

OCT 13 1966

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WM. B. LUCK, CLERK

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APPELLEE'S BRIEF.

I.

Statement of Pleadings and Jurisdictional Facts.

The Appellee agrees with and accepts as correct the Appellant's statement of pleadings and jurisdictional facts.

II.

The Jury Was Correctly Instructed to the Effect That the Shipowner's Own Fault May Preclude Recovery From the Stevedore Company.

The trial court correctly instructed the jury that if it (the jury) should find that the vessel or its cargo was in such a condition that the stevedore was prevented or seriously handicapped in its ability to discharge the vessel in a workmanlike manner and with

reasonable safety, then the shipowner is in fact precluded from recovering from the stevedore company [p. 259, line 24, to p. 260, line 4]. Although the appellant-shipowner, at page 8 of its brief, argues that "It is settled that creation of a dangerous condition by the shipowner does not preclude indemnity" such is simply not the law. An analysis of the cases clearly indicates that the law is that the creation of a dangerous condition by the shipowner, *may or may not* preclude indemnity. Whether or not it does in fact preclude indemnity is a question to be decided by the trier of fact.

The United States Supreme Court has made it clear that even in cases in which the stevedore's services have been substandard, the shipowner's own conduct may preclude its recovery from the stevedore company. *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 567, 78 S.Ct. at 441, 2 L.Ed. 2d 491. As shall be pointed out, the cases selected by the appellant in its brief were simply illustrations of situations in which the trier of fact decided that the shipowner's own fault was not sufficient, in view of the particular factual situation involved in each individual case. to preclude its recovery of indemnity from the stevedore company.

A. All Cases Cited by the Shipowner Involved Completely Different Circumstances Than Those of This Case.

In *Crumady v. Joachim Hendrik Fisser*, 358 U.S. 423, 3 L.Ed. 2d 413, 79 S.Ct. 445 (1959) the shipowner had originally created a dangerous condition by setting the cut-off for the winches in question at twice the safe working load of the booms. But the stevedore company subsequently moved the head of the boom,

and this subsequent conduct of the stevedore created a load on the booms greatly in excess of the safe working load. The condition which the ship had created was no longer even in existence at the time of the accident and accordingly played no part at all in the causation of the accident. Likewise, in *Waterman S.S. Corp. v. Dugan & McNamara*, 346 U.S. 421, 5 L.Ed. 2d 169, 81 S.Ct. 200 (1960) the ship did not create a dangerous condition but instead the stevedore itself created the dangerous condition when it discharged a portion of the stow in such a way as to leave the remainder of the stow without lateral support, thereby allowing the remainder of the stow to topple down upon the plaintiff, and, in *Matson Terminals, Inc. v. Caldwell*, 354 F.2d 681 (9th Cir. 1965), it would have been a simple matter for the stevedore company to either obtain assurance from the shipowner that the winches in question had, in fact, been repaired, or to have itself conducted a test of the said winches to determine whether the winches had been repaired; but the stevedore did neither. The situation *DeGioia v. United States Lines Co.*, 304 F.2d 421, 424 (2 Cir. 1962), was one in which the stevedore could easily have had its employees clean up the tangle of loose wire lashings, shackles, dunnage, and other objects, before commencing its stevedore operations in the area, while in *Simpson v. Royal Rotterdam Lloyd*, 255 F.Supp. 947 (S.D. N.Y. 1964), the ingots being discharged apparently could have been wiped free of grease with clean rags before they were discharged, thus eliminating the dangerous condition which caused the accident.

Similar alternatives were available to the stevedore company in each and every other case cited by appellant in its opening brief.

However, quite a different and far removed situation was present in the instant case. The 1,600 pound rolls of newsprint being discharged at the time of the plaintiff's accident were stowed, by the ship, on top of shaft alleys which were about 2½ feet above the working surface on which the longshoremen were working. Rolls of newsprint are not customarily stowed atop shaft alleys in this fashion [Rep. Tr. p. 197, lines 10-13; p. 198, lines 2-9]. The employees of the appellee-stevedore company had nothing at all to do with placing the rolls of newsprint in their aforescribed position above the shaft alleys [Rep. Tr. p. 177, lines 5-9]. The rolls were in that location when the vessel was brought to the stevedore company by the appellant Johnson Line [Rep. Tr. p. 177, lines 12-14; p. 202, line 25, to p. 203, line 6].

There is a strong inference that the vessel's own officers not only had full knowledge of the location in which the rolls were stowed atop the shaft alleys but also that the vessel's own officers had themselves directed that the rolls be placed in that exact location. It is clear that the custom and practice of appellant Johnson Line officers, at least in the Los Angeles Harbor, is to tell loading stevedores in what particular portion of their vessels cargo is to be placed [Rep. Tr. p. 204, line 25, to p. 205, line 13].

That the stevedore ship boss originally intended the longshoremen to pull the rolls over onto the shelf or shaft alley upon which the rolls were stowed is clear. The record is equally clear that the ship boss, while he originally so intended, assumed that there was in fact room enough up on the shelf to pull the rolls over [Rep. Tr. p. 173, line 24, to p. 174, line 2]. How-

ever, the ship boss was not down in the deep tank of No. 5 hatch at any time [Rep. Tr. p. 139, lines 4-8]. His position at all relevant times was up on the main deck of the vessel [Rep. Tr. p. 139, lines 9-11]. He did not see the inshore side of the deep tank [Rep. Tr. p. 173, lines 10-13] and so was not aware of the fact that there was not room on the shelf upon which to pull the rolls over.

In order for the rolls to have been pulled over on top of the shaft alley-shelf itself, it would have been necessary for there to have been at least a five foot long clear space for the sixty inch tall rolls to fall onto [Rep. Tr. p. 174, lines 3-6], and this five foot length of clear space would have had to have been more than two feet wide either way to allow for the breadth of the roll [Rep. Tr. p. 174, lines 7-8]. In addition, the two men pulling the rolls over would need working room adjacent to the rolls being worked [Rep. Tr. p. 174, lines 16-19; p. 182, line 4, to p. 183, line 7].

The fact of the matter is that there was simply no space atop the shaft alley shelf for the men to work in pulling the rolls over on the shelf itself. A solid stow of cargo extended from the forward edge of the after-hatch opening back to the after bulkhead [Rep. Tr. p. 109, lines 13-16]. Not a single shred of evidence contradicts the testimony of the hatch boss that, shortly before the accident occurred, he did not observe any room on the starboard shelf for men to stand and work [Rep. Tr. p. 197, lines 3-6]. Accordingly, the conclusion follows that the method of discharge originally intended by the ship boss was based upon an assumption which was not consistent with the facts.

Considering the actual facts relevant to the manner in which the appellant-shipowner had caused its cargo to be stowed aboard its vessel, the method of discharge which the ship boss had in mind was in actuality not capable of being carried out. It could not have been carried out because of the condition and position of the cargo at the time the shipowner turned its vessel and cargo over to the stevedore company.

B. There Were No Practical Alternatives Available to the Stevedore Because of the Fault of the Shipowner.

The appellant more or less attempts to sell the idea that there were alternative methods of discharge available to the stevedore company at the time of the accident. The record makes such a sale impossible.

A reading of the transcript makes it apparent that there is no testimony to contradict that which is stated repeatedly and in unequivocal terms that a squeeze-clamp type of jitney could not be used because the area in which the appellant-shipowner had placed the rolls was too small to allow such a jitney to operate [Rep. Tr. p. 65, line 4, to p. 66, line 9; p. 120, lines 9-13; p. 140, lines 2-14; p. 167, lines 11-24; p. 174, line 20, to p. 175, line 19]. The record is likewise clear that a squeeze-clamp type of jitney is the customary and safest means of removing rolls of newsprint from aboard vessels. [Rep. Tr. p. 175, lines 15-19; to p. 198, line 2, to p. 199, line 7].

Although the appellant also touched briefly on the subject of the use of manual clamps, such were described by ship boss Mann as being dangerous [Rep. Tr. p. 157, line 22, to p. 158, line 10] and by hatch boss Hendrickson as being not possible to use with the

rolls in the particular position in which they were at the time of the accident, as being too heavy, and as being dangerous to the longshoremen's hands [Rep. Tr. p. 202, lines 15-24]. Likewise without contradiction is the evidence that custom and practice in Southern California regarding removal of another port's cargo is that this is only done when it is in the way of Los Angeles cargo. [Rep. Tr. p. 221, lines 3-7]. None of the evidence indicates that cargo for any other port was in the way of the rolls of newsprint.

Of paramount interest is the observation that the shipowner, upon whose shoulders rested the burden of proving its case against the stevedore company, produced not one word, nor a single witness, expert, or authority, to endeavor to show that there was any other possible method of discharging the rolls from atop the shelves. To this very moment the only direct evidence on this point was the plaintiff's testimony that from his own observation just before the accident occurred he himself did not see any way to conduct the discharge which was, under the existing conditions any, safer than the method being used by the appellee-stevedore company [Rep. Tr. p. 126, line 25, to p. 127, line 7].

The appellant-shipowner urges that a stevedore company may be under a duty to stop work rather than continue to work in the face of a known dangerous condition and that the stevedore's failure to stop work may constitute a waiver of the shipowner's own breach of contract. Without a solitary exception, each and every case relied upon by the shipowner in this connection involves a factual situation in which, by stopping its operations, the stevedore company itself could

either rectify the unsafe condition or have it corrected by the shipowner. (See *Hugev v. Dampskisaktieselskabet International*, 170 Fed. Supp. 601 (S.D. Cal. 1959), which involved a known defective hatch beam which, had the stevedore stopped work, could either have been removed, replaced by a good hatch beam, or repaired so that it would no longer be unsafe; *American President Lines, Ltd. v. Marine Terminals, Corp.*, 234 F.2d 753 (9th Cir. 1956), cert. den. 352 U.S. 926, 1 L.Ed. 2d 161, 77 S.Ct. 222, in which stevedore company knew that a safety lock was missing on a strong back but nonetheless continued work until the accident occurred although the stevedore, by stopping work, could have removed the defective strong back, could have repaired the defective strong back, or could have replaced the defective strong back with a proper strong back, or have had the shipowner undertake one of these alternatives; *Weigel v. The M/V Belgrano*, 188 Fed. Supp. 605 (D.C. Ore. 1960), in which the stevedore company was aware of the fact that the vessel's lift gear was malfunctioning but continued with its stevedoring operations, using the malfunctioning lift gear without either stopping to have the lift gear fixed, fix it itself, or use other lift gear; also see *Matson Terminals, Inc.* (*supra*) and *Nicroli* (*supra*)).

Accordingly, there is herein a complete and absolute failure by the shipowner to cite a single case under the facts of which, even if the stevedore company had stopped work in the face of a known dangerous condition, the dangerous condition could not have been cor-

rected. The reason for the shipowner's failure to cite a single case to that effect is that the law simply does not impose an obligation upon a stevedore company to stop work in the face of a dangerous condition created by the ship when, by stopping work, the dangerous condition could not be corrected, but would instead, result in nothing being accomplished. Likewise, the case law only holds the stevedore to have waived the shipowner's own breach by continuing with its stevedoring operations in those cases in which, by stopping the stevedoring operations, the breach of the shipowner could in fact have been corrected.

In the instant case the entire record fails to even hint of any action that could have been taken by any persons, including but not limited to the appellee, to correct the conditions resulting from the manner in which the shipowner had allowed its cargo to be stowed. The record is clear that the only course of conduct open to the stevedore company if it was in fact to perform its contract with the shipowner of discharging the vessel, was to continue with the discharge operations in the safest manner possible under the circumstances since, by stopping its operations, absolutely nothing could have been done to eliminate the risks involved. To reiterate, there is apparently no case, and appellant certainly cites no such case, which in any manner whatsoever indicates that a stevedore company has an obligation to stop work when by so stopping its operations an unsafe condition cannot be eliminated or corrected.

III.

The Law Clearly Places Definite Duties on the Shipowner to the Stevedore, Just as It Does on the Stevedore, and the Shipowner's Material Breach of His Own Duties to the Stevedore Precludes Indemnity.

A. The Shipowner's Own Breach of Contract.

Interestingly enough, throughout the shipowner's brief repeated reference is made to the stevedore company, the stevedore operations, and the conduct of the stevedore employees. Repeated efforts are made to focus attention upon the stevedore company and its operations. So effectively is this done that page after page of the brief goes by without any reference to the vessel, its officers, and its cargo of newsprint rolls stored atop the shaft alley, nor to the dangerous way in which the rolls had been stowed and the resulting unsafe conditions which confronted the stevedore company when the vessel came into port. The underlying theme of the shipowner's opening brief seems to be that since the longshoremen were attempting to discharge the cargo at the time of the accident, then, regardless of the fault of the shipowner itself, and regardless of the dangerous conditions created by the shipowner itself, that if there was in fact an accident, indemnity over against the stevedore company should be a matter of right. This theme of the shipowner is somewhat akin to the explanation of the gentleman who planted a land mine which exploded some days after he left it and, when called upon for an explanation, impliedly asserted that

even though he had placed the mine in the position it was in when it exploded, he had nonetheless been far removed from the scene for some time, and therefore, how could fault possibly be his?

Appellee urges that a fair reading of the transcript indicates without question the facts already referred to earlier in this brief to the effect that the vessel belonged to the appellant and that this vessel of the appellant, at the time it was turned over to the stevedore company, had the rolls of newsprint already stowed atop its shelves, inferentially at the direction of the shipowner's officers, in such a manner that, even to the plaintiff Bojorquez himself, the method being employed by the appellee at the time of the accident was apparently the safest method available to the stevedore company. The record further clearly indicates that the rolls had been stowed by the shipowner in a location aboard the vessel so that the customary method of a squeeze-clamp type of jitney could not be used to discharge them mechanically. Nor had they been stowed by the shipowner in such a location aboard the vessel that manual clamps of some type could have been used to discharge them. Nor had they been stowed by the shipowner in such a manner that space was available upon the shelves upon which the rolls themselves were stowed to allow men to knock the rolls over upon the shelves rather than having to pull them over into the pit between the shelves. To the contrary, the rolls were stowed by the shipowner in such a way that the only method available to the stevedore company to discharge the rolls

was the method which was in fact being used at the time of the accident. The true cause of the accident was that the location of the rolls, at the time the shipowner brought the ship in to be unloaded and up to the time of the accident, was such that the stevedore company was forced to employ the method of discharge it was in fact employing at the time of the plaintiff's injury. The evidence is that there was no other way for the job to be done.

A shipowner is charged with placing its vessel in such a condition as to permit a stevedoring company to be able to load or unload cargo with reasonable safety by the use of ordinary care (see *Hugev (supra)*), cited by appellant in its opening brief), and as the Supreme Court has pointed out when discussing the shipowner's own breach, in *Weyerhaeuser (supra)*, a shipowner is entitled to indemnity when a stevedore company has rendered a substandard performance, *absent conduct on its (the shipowner's) part to preclude recovery*. (Italics and material in parentheses ours). The Supreme Court's language in *Weyerhaeuser (supra)* has been interpreted by the United States Court of Appeals for the Second Circuit in *Pettus v. Grace Line v. Sealand Dock & Terminal Co.*, 305 F.2d 151 (1962):

"To be sure, since the claim for indemnity is based on the stevedoring contract, a material breach of that contract by Grace Line would preclude its enforcing the contract to recover indemnity."

That the United States Supreme Court and the United States Court of Appeals for the Second Circuit would so state is not at all surprising because the most elementary propositions of the law of contracts tell us that a party who attempts to recover damages for breach of contract must prove that he himself has complied with his obligations thereunder and if the party seeking recovery has not himself complied with the obligations under the contract, then, regardless of the fault of the other party to the contract, the party seeking recovery, because of his own breach, cannot recover.

That the position of the appellee as set forth in the preceding paragraph is in fact correct was in effect acknowledged by counsel for the appellant when no objection of any sort whatsoever was made by appellant's counsel to the court's instruction that "If the shipowner failed in a material respect to perform its said obligation, then regardless of whether or not the stevedoring company performed its said obligation, the verdict will be in favor of the stevedoring company and against the shipowner [Rep. Tr. p. 259, lines 14-18].

Although the *Weyerhauser* and *Pettus* (*supra*) cases as well as others speak in general terms of a shipowner being precluded from recovering indemnity because of the shipowner's own fault, there are few cases which have been called upon to apply these principles to specific factual situations although the general proposition finds itself repeated in many cases. However, just last year in the Second Circuit *Albanese v. N/V Nederl. Amerik. Stoom v. Maats*, 346 F.2d 481 (2nd Cir. 1965), reversed as to another point 382 U.S.

283, 1966 A.M.C. 557, was decided and stands in part for the proposition that:

“Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at least prevent or seriously handicap the stevedore in his ability to do a workmanlike job, merely concurrent fault is not enough.”

Albanese (supra) at 484.

Interestingly enough, there exists, at least to appellee's knowledge, no one case of any single court in the land *contra* to *Albanese (supra)*. In view of *Albanese*, the court in the instant case instructed the jury that

“If you should find that the vessel or its cargo was in such condition that the stevedore was prevented or seriously handicapped in its ability to discharge the vessel in a workmanlike manner and with reasonable safety then the shipowner is in fact precluded from recovering from the stevedore company.” [Rep. Tr. p. 259, line 24, to p. 260. line 4].

The foregoing instruction correctly states the law as applied to the shipowner's own fault in indemnity actions such as this. This instruction, together with the several instructions which were given at the request of the shipowner's attorneys dealing with the law relating to breach of contract on the part of the stevedore company, constituted a fair and complete set of instructions dealing with the respective rights, duties and obligations running not only from the stevedore company to the shipowner but from the shipowner to the stevedore company as well.

IV.

The Trial Court Properly Denied the Shipowner's Motion for Directed Verdict and Judgment Notwithstanding the Verdict and Left the Determination of Questions of Fact to the Jury.

A. Such motions are considered most strongly in favor of the party against whom such motions are made. In ruling on motions for a new trial and motions for a directed verdict, the trial court views the evidence in the light most favorable to the party against whom the motion is made.

Mandro v. Vibbert (4th Cir. 1948), 170 F.2d 540;

Solomon v. United States (6th Cir. 1960), 276 F.2d 669, cert. den. (1960), 364 U.S. 890, 81 S.Ct. 219, 5 L.Ed. 2d 186, reh. den. (1961), 364 U.S. 939, 81 S.Ct. 376, 5 L.Ed. 2d 371;

Dun & Bradstreet, Inc. v. Nicklaus (8th Cir. 1965), 340 F.2d 882, cert. den. (1965), 86 S.Ct. 57.

On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion was made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.

Myers v. American Well Works (4th Cir. 1940), 114 F.2d 252, cert. den. (1941), 313 U.S. 563, 61 S.Ct. 842, 85 L.Ed. 1522;

O'Connor v. Pennsylvania R. Co. (2nd Cir. 1962), 308 F.2d 911.

In view of the extensive testimony already referred to in this brief dealing with (a) the stowage of cargo by the shipowner, (b) the lack of alternative methods of discharge available to the stevedore company, and (c) testimony that the cargo was already stowed in the manner described at the time it was turned over to the stevedore by the shipowner, the question of whether or not these facts were true and constituted a material breach of contract on the part of the shipowner itself was properly left to the jury. Interestingly enough, the shipowner endeavored to bring up the question of a possible stevedore company waiver of the shipowner's own breach at the time the motion for a judgment notwithstanding the verdict was made. Reference to the pleadings of the case, the entire court file, all of the evidence adduced at the time of trial, all of the instructions proposed by the shipowner, all of the instructions in fact given by the court, the single objection to instructions made by the shipowner and the arguments of the shipowner in support of his motion for a directed verdict indicates that at no time throughout the entire course of the trial was the question of whether or not the stevedore company waived the shipowner's own breach an issue in the case. Accordingly, it is inconceivable that this question, which, was at no time whatsoever made an issue in any form whatsoever by the shipowner could seriously and/or successfully be urged by the shipowner as a basis upon which to grant his motion for a judgment notwithstanding the verdict. Although the appellee takes the position that the question of whether or not the stevedore can waive the shipowner's own breach in a factual situation such as the instant case is in need of

judicial determination by this Circuit, the fact that this particular question was not even an issue in this case would seem to make such a determination unnecessary herein.

Conclusion.

Appellee wishes also to cite the *Italia* case (*Italia v. Oregon Stevedoring Co.*, 376 U.S. 315, 11 L.Ed. 2d 732, 84 S.Ct. 748 (1941)), and particularly calls the court's attention to that portion of the opinion cited by the shipowner to the effect that as between the shipowner and the stevedore company the party in the best position to prevent the longshoreman's accident will be made to bear the financial burden of his injuries. In the instant case the shipowner, either by stowing the rolls of newsprint, or by directing their stowage, in such a way that the stevedore company could discharge them, through the use of ordinary care, with reasonable safety, would, of course, have prevented the injury to the longshoreman. Instead of that, the shipowner, who had apparent complete and final control over the method in which the cargo was placed aboard the vessel as well as the location aboard the vessel where the cargo was in fact placed, nonetheless placed cargo in such a location that the stevedore company *could not* discharge the vessel with reasonable safety through the use of ordinary care. Certainly the stevedore company was not in the best position to prevent the longshoreman's accident because it was precluded from using customary methods of discharge by the way the shipowner had stowed the cargo. An argument that the stevedore should have ceased work is futile and impractical because nothing indicates that by ceasing work the dangerous condition could have been eliminated.

Had the stevedore, in fact, stopped its stevedore operations then, when operations were resumed, the same method of discharge would have been resumed since it was the only way there was to do the job. Since the shipowner could easily have prevented the accident by simply placing the rolls in a location in which the stevedore company could have used its customary method of discharging them, the shipowner was certainly the party in the best position to have prevented the accident. Significantly, the verdict herein indicates that this was the very conclusion of the jury.

Respectfully submitted,

SIKES, PINNEY & MATTHEW,
By JOHN SCOTT MATTHEW,
Attorneys for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN SCOTT MATTHEW

No. 21161

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

REDERI A/B NORDSTJERNAN, etc.,
aka JOHNSON LINE,

Appellant,

vs.

CRESCENT WHARF & WAREHOUSE Co.,

Appellee.

UPON APPEAL FROM THE
UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF OF APPELLANT REDERI A/B NORDSTJERNAN

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OCT 31 1966

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WM. B. LUCK, CLERK

FEB 15 1967

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**REPLY BRIEF OF APPELLANT
REDERI A/B NORDSTJERNAN**

**THE STEVEDORE COMPANY'S AUTHORITIES
PROVE THE IMPROPRIETY OF ITS INSTRU-
CTION THAT THE SHIPOWNER WAS PRE-
CLUDED FROM RECOVERING INDEMNITY IF
THE CARGO WAS IN SUCH CONDITION THAT
THE STEVEDORE COMPANY WAS HANDI-
CAPPED IN ITS ABILITY TO SAFELY DIS-
CHARGE THE SHIP.**

In an abortive attempt to support this erroneous instruction, the Stevedore Company relied in its brief on *Albanese v. N/V Nederl. Amerik, Stoom v. Moots*, 346 F.2d 481 (2nd Cir. 1965) and at the trial relied on *Mortensen v. A/S Glittre*, 348 F.2d 383 (2nd Cir. 1965). A reading of those cases reveals they repudiate the Stevedore Company's claim that this is a proper instruction and fully support the Shipowner's position in this appeal. In *Mortensen*, the Court said at p. 385:

"It is well established that the mere creation of the unsafe condition is insufficient to preclude recovery over where the contractor's own negligence brought the unseaworthiness of the vessel into play. Crumady v. J. H. Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.ed2d 413 (1959). Despite every opportunity to do so during the course of the trial, no effort was made to show and no claim was made that Glittre's (Shipowner) conduct consisted of anything more than the creation of the hazard which underlay the unseaworthiness claim, let alone that it amounted to active hindrance of the contractor in the performance of its contractual duties which, as we

stated in Albanese, supra, at 484 of 346 F.2d, is required to defeat the indemnification action.”
[italics added]

Thus, according to appellee’s authorities, the Shipowner is not precluded from indemnity unless it actively hindered the Stevedore Company. Mere creation of a claimed unsafe condition, such as allegedly improper stowage of cargo, does not preclude the Shipowner from indemnity where, as here, the Stevedore Company had knowledge of that condition and carelessly brought it into play. It follows, therefore, that the Stevedore Company’s instruction was erroneous.

II

THE TRIAL COURT ERRED IN DENYING THE SHIPOWNER’S MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT.

A. There is no Support in the Evidence or the Law for the Stevedore Company’s Claim That There Was No Safe Method of Discharging the Cargo.

Counsel asserts that the Stevedore Company superintendent, with 37 years of expert stevedoring experience, including 20 as its superintendent, made assumptions not consistent with facts in deciding its employees should have broken the rolls over on the shelves. Mr. Mann testified at the trial, however, that in light of all the circumstances he still believed breaking the rolls over onto the shelves was a logical and proper method of doing the work [Rep.Tr. p. 170, lines 13-22]. In short, none of

the circumstances mentioned by counsel had altered the opinion of its superintendent that this was a safe and proper method.

Another safe method was suggested, also, by Mr. Mann. He testified it is a common stevedore practice to “table up” or build a platform on which the longshoremen can work next to the stow [Rep.Tr. p. 145, lines 5-9]. Such a platform could have been constructed in the well and the rolls could have been broken over onto the platform. No evidence was presented that this would have been an unsafe or impractical solution.

In short, the Stevedore Company’s superintendent suggested two safe methods of discharge. Counsel should not attempt at this late date to repudiate the very damaging admissions made by Mr. Mann or to impugn his professional skill and judgment. After all, the Stevedore Company has made him the supervisor of its entire operation.

The argument that there was no safe way of doing the work has no legal significance in any event. This argument was recently urged upon the Court by the same counsel in *Crescent Wharf & Warehouse v. Compania Naviera De Baja*, No. 20,197, decided September 16, 1966, (9th Cir. 1966). It was rejected there and should be rejected again. As the Court said at p. 7 of its opinion:

“If, as contended by Crescent, there was no other method of loading the vessel than the one employed, then we do not believe Crescent was justified in carrying on a loading operation which it knew to be dangerous”.

The soundness of the Court's decision is obvious. A Shipowner should be notified at least where there is no safe work method and given an opportunity to decide whether it wants to accept the risk of injury. A Stevedore Company should not be permitted to use a hazardous method of discharge, without notice to the Shipowner, and thereby subject the Shipowner to liability for a resultant injury.

B. The Stevedore Company Cannot Deny It Waives Any Possibility of Breach of Duty by the Shipowner Where It Willingly Elected, Without Consulting or Advising the Shipowner, to Proceed with the Discharge in a Dangerous and Improper Manner.

The merit of the Shipowner's argument was recently redemonstrated in *Crescent Wharf & Warehouse v. Compania Naviera De Baja Calif.*, supra, where this Court said (p. 7 of the opinion):

“It is apparent . . . that the presence of the flange created a known hazard. Assuming that Compania's [shipowner] action constituted a breach of its contractual obligation, the evidence here justifies a finding of a waiver of said breach. See *Metropolitan Steve. Co. v. Dampskisaktieselskabet Int.*”

There is no doubt that the condition of the stow was well known to the Stevedore Company prior to commencement of discharge operations. Its hatch boss took measurements of the stow [Rep.Tr. p. 66, lines 8-9]. The cargo was carefully examined by the Stevedore Company's hatch boss, ship boss and superintendent [Rep.Tr. p. 138, lines 6-23]. No claim has been made at any time

there was any danger in the stowage not fully known to the Stevedore Company prior to the accident.

In view of the authorities and evidence, it is clear the Stevedore Company waived any breach of duty by the Shipowner. As the Stevedore Company was forced to admit and concede it breached its warranty of workman-like service [Rep.Tr. p. 281, line 18, to p. 282, line 2], it follows that the Stevedore Company's liability was established and the Shipowner's motions for a directed verdict and judgment notwithstanding the verdict should have been granted.

The Stevedore Company asserts the issue of waiver was not asserted at the trial and cannot be relied on now. There is no merit in this claim because waiver was clearly one of the grounds urged in the trial court for the granting of these motions.

C. Whether Phrased in Terms of Waiver or Otherwise, It is Clear That Where a Stevedore Company has Knowledge of an Unsafe Condition, and Fails to Stop Work or Correct It, the Shipowner is Entitled to a Directed Verdict or Judgment Notwithstanding the Verdict.

This question arose recently in *Mosley v. Cia. Mar. Adra S.A.*, 362 F.2d 118, (2nd Cir. 1966), where a longshoreman sued for injuries suffered when he slipped on cargo. The jury denied the Shipowner indemnity but the trial court granted judgment for the Shipowner notwithstanding the verdict. In affirming the ruling on the motion, the Second Circuit stated at p. 122:

“A Stevedore Company is liable for indemnity if it creates an unseaworthy condition, or if it fails to eliminate a known risk created by another. See *Mortensen v. A/S Glittre*, 348 F.2d 383, 385 (2nd Cir. 1965). Since Ripsett (the Stevedore Company) furnished and rigged the chute, and controlled all other relevant aspects of the loading, the jury would have to find the Stevedore Company was liable for a breach of its warranty of workmanlike service.”

The same rule of law is well settled in this Circuit. See *Matson Terminals, Inc. v. Caldwell*, 354 F.2d 681 (9th Cir. 1965).

CONCLUSION

The Shipowner in this case hired an expert and experienced Stevedore Company to discharge its vessel in a safe and competent manner. The Stevedore Company had sole charge of the discharge operation and at no time, either consulted or advised the Shipowner concerning the status of the operation.

When the Stevedore Company discharged rolls of paper from #5 deep tank, it elected of its own accord, and without notice to the Shipowner, to use a method everyone considered dangerous. The election was made over the protests of the longshoremen and despite the intent of the Stevedore Company's superintendent that the work be done in another way. The method was so hazardous the superintendent declared he would have stopped its use had he known about it. Plaintiff herein was injured as a direct and proximate result of the use of that method.

In this litigation, the Stevedore Company says in effect that, no matter how wanton or unsafe its conduct, the Shipowner should bear the burden of plaintiff's injury. The Stevedore Company's argument overlooks the fact that it is an expert and obligated by law to stop work or correct any condition it considers unsafe.

The burden of this injury should clearly fall on the Stevedore Company, as required by *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315, 11 L.ed2d 732, 84 S.Ct. 748 (1964). If it had simply done what was required of it by law and common sense, there would have been no injury.

Respectfully submitted,

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Attorneys for Appellant

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Francis J. MacLaughlin



No. 21,166 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA,
a corporation,

Plaintiff and Appellant,

vs.

ROBERT T. GREENE, et al.,

Defendants and Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California
(Southern Division)

Honorable Lloyd Burke, Judge

APPELLANT'S OPENING BRIEF

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Honorable Lloyd Burke, Judge

APPELLANT'S OPENING BRIEF

STATEMENT OF JURISDICTION

As alleged in Appellant's complaint for declaratory relief (Clerk's Transcript, pp. 1, 2) the defendants Isensee at all times were and are now citizens of the State of Oregon. Defendants Greene are citizens of the State of California. Appellant is a corporation incorporated under and by virtue of the laws of the State of Pennsylvania. The defendants Isensee have filed a lawsuit for personal injuries with a demand in excess of \$10,000 in the Superior Court of the State

of California in and for the County of San Mateo, No. 105900, against defendants Greene as a result of an accident which occurred on July 14, 1962. Defendants Greene have demanded coverage of the Appellant and a defense of the aforesaid lawsuit by virtue of Appellant's Homeowners Policy No. H 15-79-08, which was issued to defendants Greene on July 2, 1962. Appellant denies that any coverage exists under the terms of said policy.

28 U.S.C. 2201 provides:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Art. III, Sec. 2, Clause 1 of the United States Constitution provides in pertinent part:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; . . . as to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . ."

This declaratory relief action was filed in the United States District Court for the Northern District of California (Southern Division) on June 18,

1964. The District Court rendered judgment against the Appellant on June 27, 1966, which judgment was entered by the Clerk on June 30, 1966. (Clerk's Transcript, p. 35.)

28 U.S.C. 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF CASE

This is an appeal from judgment of the United States District Court for the Northern District of California (Southern Division), the Honorable Lloyd Burke, Judge, Presiding, in an action for declaratory relief filed by the Appellant on June 18, 1964. Appellant seeks declaratory relief from affording insurance coverage under its Homeowner's Policy "B" No. H 15-79-08, issued to defendants Robert T. Greene and Helen K. Greene, July 2, 1962. (Plaintiff's Exhibit No. 3; RT pp. 2, 3.)

The policy contains the following exclusion (Plaintiff's Exhibit No. 5):

"This Section does not apply:

* * * * * *

b. under Coverages E and F, to the ownership, maintenance, operation, use, loading and unloading of (1) automobiles or midget automobiles while away from the premises or the ways immediately adjoining . . ."

On or about July 14, 1962, defendant Robert T. Greene, the son of defendants Stanley R. Greene and Helen K. Greene, was operating a gasoline motor driven "go-cart". He was involved in an accident with the person of defendant Charlotte Isensee whereby the latter allegedly sustained bodily injury. The place where the accident occurred was at a point fifty feet beyond or generally north of the rear property line of the defendants Greenes' property, and on an easement adjacent to the Newmayer property. (Plaintiff's Exhibit No. 1, RT p. 5.) This easement, called the Hickey easement, belonged to the Newmayers and constituted a private driveway to the Newmayer property. (Plaintiff's Exhibit No. 1.)

This easement was parallel to the Greenes' driveway. It was separated from the Greenes' driveway by a redwood fence which extended from Olive Hill Lane in a generally northerly direction to the back property line of the defendants Greenes' premises. The Hickey easement continued beyond the real property line of Greenes' property where it adjoined the Newmayer property and not that of Greenes. A wire fence extended from the northerly end of the wooden fence referred to above. This wire fence continued northerly with the Newmayer property to the east of it and the Hickey easement to the west of it. These fences are illustrated in Plaintiff's Exhibits No. 1, 2A, 2B and 2C. There was no break in either fence to allow a vehicle to pass from the defendants Greenes' driveway to the easement constituting the Newmayer driveway. (RT pp. 40-41.)

ISSUES

As designated by the pretrial order (Clerk's Transcript, p. 18) the sole issue is whether the point at which the accident occurred was on "a way immediately adjoining" the Greenes' property and covered by policy No. H 15-79-08 issued by Appellant to the defendants Greene.

SPECIFICATION OF ERRORS

1. The District Court erred in finding and concluding that the accident occurred on "the ways immediately adjoining" the defendants Greenes' premises. (Clerk's Transcript, pp. 25-26; RT pp. 43-44.) The record clearly establishes (and it was so stipulated) that the accident in question occurred fifty feet north of the most northerly property line of Greenes' premises and on an easement known as the Hickey easement which constitutes the private drive of the Newmayer property. (Plaintiff's Exhibits Nos. 1, 2A, 2B, 2C; RT pp. 1, 41-43.)

2. The District Court erred in finding and concluding that the Appellant afforded coverage to defendants Greene under the terms of its policy No. H 15-79-08, and that the exclusions therein did not apply. (Clerk's Transcript, pp. 25-26; RT p. 44.) The said policy clearly states that no coverage for personal liability is provided while an automobile or midget automobile was being operated "while away from the premises or the ways immediately adjoining." (Plaintiff's Exhibits Nos. 3, 4 and 5.)

ARGUMENT

The term “immediately adjoining” as used in an insurance policy relating to operations conducted on or about the insured’s premises, has been defined by this Court in *United States v. Great American Indemnity Company*, 214 F.2d 17 (9th Cir. 1954). In that case the insurance carrier insured a beauty shop which occupied a mezzanine of a building owned by the Federal government. The shop was connected to the public sidewalk by a stairway leading from the street level to an upper hall and entrance to the beauty shop. A woman fell and was injured on the sidewalk about two to three steps in front of the point where the stairway to the mezzanine joined the sidewalk. After the woman recovered judgment against the United States, the government sought indemnification against the insurer of the beauty parlor. The policy provided coverage for accidents occurring on the premises including buildings and structures and “the ways immediately adjoining.” This Court stated at 214 F.2d p. 19 that the words “immediately adjoining” are unequivocal and have definite and certain meaning. “Adjoining means touching or contiguous, in contact with, as distinguished from lying near or adjacent. . . . When coupled with the word ‘immediately’ the word is used in its most restrictive sense.” With respect to the beauty parlor contract this Court said at 214 F.2d p. 19:

“While the entranceway and the hall immediately outside the beauty shop may well be included within the phrase ‘ways immediately adjoining’

it would be totally unreasonable to say that coverage extended down the stairway and out onto the sidewalk."

Another insurance carrier insured a grocery store in the same building. The woman had fallen thirty-five feet west of the point where the grocery store's entrance contacted the sidewalk and several feet west of the nearest corner of the grocery store. With respect to this policy, this Court held at 214 F.2d p. 19 that the "restrictive words 'immediately adjoining' embrace at most that portion of the sidewalk abutting or touching the grocery store. The place of the fall being several feet west of the nearest corner of the grocery store, it was not within the terms of the policy." It was ruled that there was no coverage under either policy.

In *Long v. London and Lancashire Indemnity Company of America*, 119 F.2d 628 (6th Cir. 1941) the Court was considering the meaning of the phrase "immediately adjacent" to the insured premises. The insured's dog had started to chase the plaintiff from the road immediately adjacent to the insured premises and then struck the plaintiff's motorcycle on a public street at a point sixty feet beyond the insured's property line. In holding the exclusion applicable the Court pointed out that the words "immediately adjacent" when used together mean "with no space intervening or next, as 'immediately adjoining'." To adopt some other meaning would negate the use of the word "immediately".

The Court went on to say at 119 F.2d p. 630:

“We think the words ‘immediately adjacent’ as used in the insurance policy under construction, have the same natural significance as the words ‘immediately adjoining’. Unless such construction be adopted, the word ‘immediately’ in the present context would have no practical effect. Its express use must not be disregarded. *If the insurance company had intended to cover an accident on ways adjacent to the insured premises, there would have been no occasion for using the qualifying word ‘immediately’ in conjunction with the word ‘adjacent’ . . . If the policy coverage had been intended despite intervening space, the insurer would have used some such expression as ‘closely adjacent’ or ‘nearly adjacent’.*” (Emphasis added.)

The case at bar is not distinguishable from the *Great American* case, *supra*, nor from the *Long* case, *supra*. It would seem that in light of these decisions, the term “ways immediately adjoining” should be confined at most to those ways which are touching the Greenes’ property or ways over which they have direction and control. This clearly was the intent of the Appellant from the language used in the policy. The accident of July 14, 1962, did not occur on the insured premises nor on a “way” that was touching or contiguous or in contact with the insured premises. It occurred fifty feet to the north of such an area.

When this clear and unequivocal language is used in a policy of insurance, any extension of coverage

beyond the physical geographical limits defined by the policy would be unreasonable and arbitrary. In holding as it did, it would seem that the District Court has accepted an argument that was rejected by this Court in the *Great American* case, *supra*, and by other Courts in the *Long* case, *supra*, and in *National Optical Company v. United States Fidelity and Guaranty Company*, 77 Colo. 130, 245 Pac. 343. In the last case, the insured's delivery boy was in an accident while operating his bicycle on the sidewalk six blocks from the insured premises. It was claimed that the point of the accident was on a way immediately adjoining the premises as the sidewalk could be traced from the site of the accident to the point where it touched the insured premises.

It can be concluded from the cases cited, that given the clear language of the policy, it makes no difference whether the accident occurred a few feet, fifty feet, sixty feet or six blocks beyond the point where the "way" ceases to immediately adjoin the insured premises. In any case, there is no coverage afforded.

CONCLUSION

The accident in question did not occur on the defendants Greenes' premises nor on the ways immediately adjoining them. It is submitted that the decision of the District Court should be reversed and judgment entered in favor of Appellant.

Dated, San Jose, California,

October 25, 1966.

Respectfully submitted,

POPELKA, GRAHAM, HANIFIN,

VAN LOUCKS & ALLARD,

By FRED J. GRAHAM,

MALCOLM A. KING,

Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the 9th Circuit, and that in my opinion, the foregoing brief is in conformance with those rules.

Dated this 25th day of October, 1966.

POPELKA, GRAHAM, HANIFIN,

VAN LOUCKS & ALLARD,

By MALCOLM A. KING,

Attorneys for Appellant.

(Appendix Follows)

Appendix

Appendix of Exhibits

Reporter's Transcript of Trial

Plaintiff's Exhibits	Identified	Offered	Received
Number 1	1	1	3
Number 2A	2	2	3
Number 2B	2	2	3
Number 2C	2	2	3
Number 3	2	2	3
Number 4	2	2	3
Number 5	3	3	3

No. 21,166

IN THE

**United States Court of Appeals
For the Ninth Circuit**

INSURANCE COMPANY OF NORTH AMERICA,
a corporation,

Appellant,

vs.

ROBERT T. GREENE, et al.,

Appellees.

BRIEF FOR APPELLEES

KANE, OWEN & MELBYE,

By YALE W. ROHLFF,

624 Marshall Street,

Redwood City, California,

Attorneys for Appellees.

FILED

NOV 30 1966

WM. B. LUCK, CLERK

FEB 15 1967

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No. 21,166

IN THE

**United States Court of Appeals
For the Ninth Circuit**

INSURANCE COMPANY OF NORTH AMERICA,
a corporation,

Appellant,

vs.

ROBERT T. GREENE, et al.,

Appellees.

BRIEF FOR APPELLEES

STATEMENT OF JURISDICTION

As alleged in Appellant's complaint for declaratory relief (Clerk's Transcript, pp. 1, 2), the defendants Isensee at all times were and now are citizens of the State of Oregon. Defendants Greene are citizens of the State of California. Appellant is a corporation incorporated under and by virtue of the laws of the State of Pennsylvania. The defendants Isensee have filed a lawsuit for personal injuries with a demand in excess of \$10,000 in the Superior Court of the State of California, in and for the County of San Mateo, No. 105900, against defendants Greene as a result of an accident which occurred on July 14, 1962. Defendants Greene have demanded coverage of the Appellant

and a defense of the aforesaid lawsuit by virtue of Appellant's Homeowners Policy No. H 15-79-08, which was issued to defendants Greene on July 2, 1962. (Plaintiff's Exhibit No. 3; Clerk's Transcript, pp. 2, 3.) Appellant denies that any coverage exists under the terms of said policy.

28 U.S.C. 2201 provides:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Art. III, Sec. 2, Clause 1 of the United States Constitution provides in pertinent part:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; . . . as to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . ."

This declaratory relief action was filed in the United States District Court for the Northern District of California (Southern Division) on June 18, 1964. The District Court rendered judgment against the Appellant on June 27, 1966, which judgment was entered by the Clerk on June 30, 1966. (Clerk's Transcript, p. 35.)

28 U.S.C. 1291 provides:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.”

STATEMENT OF CASE

On or about July 14, 1962, defendant Robert T. Greene, the son of the defendants Stanley R. Greene and Helen K. Greene, was operating a gasoline motor driven “go-cart”. He was involved in an accident with the person of one Charlotte Isensee whereby the latter sustained bodily injury. The place where the accident occurred was at a point fifty feet north of the rear property line of the defendants Greenes’ property, and on a private driveway and easement known as the Hickey easement. This easement was used by all parties by permission of the owner (Newmayer) and constituted a private driveway to the Newmayer property.

This easement was parallel to the Greenes’ driveway. It was separated from the Greenes’ driveway by a redwood fence which extended from Olive Hill Lane in a generally northerly direction to the back property line of the defendants Greenes’ premises. The Hickey easement continued northward along the property of Newmayer. A wire fence extended from the northerly end of the wooden fence referred to above, and continued northerly with the Newmayer property. These fences are illustrated in Plaintiff’s Exhibits No. 1, 2A,

2B and 2C. There was no break in either fence to allow a vehicle to pass from the defendants Greenes' private driveway to the Hickey easement.

The policy contains the following exclusion (Plaintiff's Exhibit No. 5):

"This Section does not apply:

b. under Coverages E and F, to the ownership, maintenance, operation, use, loading and unloading of (1) automobiles or midget automobiles while away from the premises or the ways immediately adjoining . . ."

ISSUES

1. Is the point at which the accident occurred on "a way immediately adjoining" the Greenes' property and therefore covered by Policy No. H 15-79-08?

2. Is Appellant estopped from denying coverage?

ARGUMENT

I.

THE ACCIDENT GIVING RISE TO THE CLAIM OF COVERAGE IN THIS CASE OCCURRED ON "WAYS IMMEDIATELY ADJOINING" WITHIN THE PURVIEW OF THE POLICY.

The term "ways immediately adjoining" is ambiguous and uncertain, and does not attempt to define or apprise the insured of the particular area to which it attaches.

It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be

resolved against the insurer; and that if at all possible the insurance contract will be given such construction as will achieve its object of securing coverage to the insured for losses to which the contract relates. If the insurer uses language which is uncertain, any reasonable doubt will be resolved against it and in favor of the insured. (*Wildman v. Government Employees Insurance Company*, 48 C. 2d 31. Footnotes 2, 3, 4 and cases cited therein.)

The evidence in this case is clear and the Trial Court unequivocally found that the accident in question occurred on the "ways immediately adjoining" the insureds' premises. (Finding of Fact No. 11.)

In *Pacific Employers Insurance Company v. Maryland Casualty Company*, *American Mutual Liability Insurance Company*, C. 2d (decided November 9, 1966) the California Supreme Court in an unanimous decision dealing with a similar exclusion involving the use of "ways immediately adjoining" has held:

"The fact that in the instant case liability is limited to operation on the ways immediately adjoining the premises, does not, we think, constitute such a negligible intrusion into the public ways as can be ignored under some de minimis doctrine, as urged by American. The policy does not attempt to define or apprise the insured as to what particular ways are immediately adjoining, either in general terms or as applicable to the insured's particular premises. Whether the immediately adjoining ways are those within 10, 100, 1000 feet, or more, is left to speculation."

The Court further states:

“In any event, coverage is expressly provided for a use of the public ways, which would be deemed as substantial within a fair interpretation of the policy. The fact that under another interpretation, the policy’s coverage might be deemed much narrower, only raises an ambiguity which must be resolved in favor of the insured.”

A. The cases relied upon by appellant are not persuasive.

1. The *National Optical Company v. United States Fidelity & Guaranty Company* case, cited as 245 Pac. 343, involves a completely different exclusion than that relied upon in this case.

2. In the case of *Long v. London and Lancashire Indemnity Company of America*, 119 F. 2d 628, the wording “adjacent” which is often used interchangeably with the word “adjoining” was considered by the Court as follows:

“‘Adjacent is defined as being near, or close at hand; adjoining; bordering.’ New Standard Dictionary. It does not at all times mean abutting, but it is usually synonymous with abutting, adjoining, and bordering. * * * It means contiguous, adjoining, lying close at hand, near. *Its precise and exact meaning, however, is determinable principally by the context in which it is used, and the facts of each particular case, or by the subject matter to which it is applied.* 1 Corpus Juris 1196. *The term is a relative one, and hence is necessarily governed by the nature and circumstances of that to which it is applied.*” *Long v. London and Lancashire Indemnity Company of America, supra.* (Emphasis added.)

The terms “ways immediately adjoining” are at best uncertain and ambiguous. Appellant, having caused the ambiguity which exists in the policy under consideration, must have that ambiguity resolved against it. Here, just as in *Pacific Employers Insurance Company v. Maryland Casualty Company, et al., supra*, the policy “does not attempt to define or apprise the insured (Greenes) as to what particular ways are immediately adjoining, either in general terms or as applicable to the insureds’ particular premises. Whether the immediately adjoining ways are those within 10, 100, 1000 feet, or more, is left to speculation.”

II.

APPELLANT IS ESTOPPED FROM DENYING COVERAGE TO ITS INSURED.

The Appellant admitted coverage under its policy as to Coverage F, the medical-pay portion, which, it states, in its Opening Brief, specifically contained the identical Exclusion on which it relies in order to deny coverage under Coverage E of its policy. (Reporter’s Transcript, pp. 14, 15.) In fact, this admission was confirmed by a letter, a copy of which was sent to the defendants, and authorized to be so sent by Appellant. (Defendants’ Exhibit B; R.T. pp. 16, 17, 23.)

Furthermore, Appellant at no time notified defendants of its intention to deny coverage until ten months following the accident, at the same time admitting that such an act might jeopardize its insureds’ ability to properly defend the claim presented by the Isensees. (Defendants’ Exhibit A; R.T. pp. 36, 39.)

It is submitted, therefore, that in the case at bar the evidence shows that the parties at the time of contracting contemplated full coverage for accidents of the type involved. Additionally, Appellant, even following said accident, acknowledged coverage under an identical Exclusion, and thereafter did not deny coverage for an unreasonable period of time.

CONCLUSION

It is respectfully submitted that the Findings and Conclusions of the District Court are amply supported by the evidence and that the decision and judgment rendered in favor of the defendants should be affirmed.

Dated, Redwood City, California,
November 28, 1966.

KANE, OWEN & MELBYE,
By YALE W. ROHLFF,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

YALE W. ROHLFF,
Attorney for Appellees.

(Appendix Follows)

Appendix

Appendix

APPENDIX OF EXHIBITS

Defendants' Exhibits	Identified	Offered	Received
A	10	10	10
B	23	23	23

No. 21,166

IN THE
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For the Ninth Circuit

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Plaintiff and Appellant,

VS.

ROBERT T. GREENE, et al.,

Defendants and Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California
(Southern Division)

Honorable Lloyd Burke, Judge

APPELLANT'S REPLY BRIEF

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Plaintiff and Appellant,

VS.

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Defendants and Appellees.

Appeal from the Judgment of the United States District Court
for the Northern District of California
(Southern Division)

Honorable Lloyd Burke, Judge

APPELLANT'S REPLY BRIEF

STATEMENT OF JURISDICTION

This is an appeal from a judgment of the United States District Court for the Northern District of California entered on June 30, 1966 (Clerk's Transcript, p. 35) which denied appellant's relief on their complaint filed for declaratory relief (Clerk's Transcript, p. 35) which denied Appellant's relief on their defendants Isensee are citizens of the State of Oregon.

Appellees Greene are citizens of the State of California and Appellant is a corporation incorporated under the Laws of the State of Pennsylvania. (Clerk's Transcript, p. 1.) Defendants Isensee have filed an action for damages in excess of \$10,000 in the Superior Court of California in and for the County of San Mateo against appellees Greene. Original jurisdiction of the Federal District Court for the Northern District of California attached by virtue of 28 U.S.C. 1332. That Court was empowered to entertain and decide the declaratory relief action brought by Appellant under 28 U.S.C. 2201. (Clerk's Transcript, p. 2.) All such decisions have the "force and effect of a final judgment or decree and are reviewable as such." The aforesaid judgment is appealed to this Court under 28 U.S.C. 1291.

STATEMENT OF CASE

This is an appeal from the judgment of the United States District Court for the Northern District of California (Southern Division), the Honorable Lloyd Burke, Judge, Presiding, in an action for declaratory relief filed by the Appellant on June 18, 1964. Appellant seeks declaratory relief from affording insurance coverage under its Homeowner's Policy "B" No. H 15-79-08, issued to defendants Robert T. Greene and Helen K. Greene, July 3, 1962. (Plaintiff's Exhibits Nos. 3, 4; RT pp. 2, 3.)

The policy contains the following exclusion (Plaintiff's Exhibit No. 5):

“This Section does not apply:

* * * * *

b. Under Coverages E and F, to the ownership, maintenance, operation, use, loading and unloading of (1) automobiles or midget automobiles while away from the premises or the ways immediately adjoining . . .”

On or about July 14, 1962, defendant Robert T. Greene, the son of defendants Stanley R. Greene, and Helen K. Greene was operating a gasoline motor driven “go-cart”. He was involved in an accident with the person of defendant Charlotte Isensee whereby the latter allegedly sustained bodily injury. The place where the accident occurred was at a point fifty feet beyond or generally north of the rear property line of the Greenes’ property, and on an easement adjacent to the Newmayer property. (Plaintiff’s Exhibit No. 1; RT p. 5.) This easement, called the Hickey easement, belonged to the Newmayers and constituted a private driveway to the Newmayer property. (Plaintiff’s Exhibit No. 1.)

This easement was parallel to the Greenes’ driveway. It was separated from the Greenes’ driveway by a redwood fence which extended from Olive Hill Lane in a generally northerly direction to the back property line of the Greenes’ premises. The Hickey easement continued beyond the rear property line of Greenes’ property where it adjoined the Newmayer property and not that of Greene. A wire fence extended from the northerly end of the wooden fence referred to above. This wire fence continued north-

erly with the Newmayer property to the east of it and the Hickey easement to the west of it. These fences are illustrated in Plaintiff's Exhibits Nos. 1, 2A, 2B and 2C. There was no break in either fence to allow a vehicle to pass from the defendants Greenes' driveway to the easement constituting the Newmayer driveway. (RT pp. 40-41.)

ISSUES

1. Whether the accident occurred at a point on "a way immediately adjoining" the appellee Greene's property and thereby covered by Policy No. H 15-79-08 issued by Appellant.

2. In view of appellee's brief, page 7, an issue is whether the issue of estoppel is before this Court and, if so, whether the burden of proof was met in the trial in the District Court.

SPECIFICATIONS OF ERROR

1. The District Court erred in finding and concluding that the accident occurred on "the ways immediately adjoining" the defendants Greenes' premises. (Clerk's Transcript, pp. 25-36; RT pp. 43-44.) The record clearly establishes (it was so stipulated) that the accident in question occurred fifty feet north of the most northerly property line of defendants Greenes' premises and on an easement known as the Hickey

easement which constitutes the private drive of the Newmayer property. (Plaintiff's Exhibits Nos. 1, 2A, 2B, 2C; RT pp. 1, 41-43.)

2. The District Court erred in finding and concluding that the Appellant afforded coverage to defendants Greene under the terms of its Policy No. H 15-79-08, and that the exclusions therein did not apply. (Clerk's Transcript, pp. 25-26; RT p. 44.) The said policy clearly states that no coverage for personal liability is provided while an automobile or midget automobile was being operated "while away from the premises or the ways immediately adjoining". (Plaintiff's Exhibits Nos. 3, 4 and 5.)

ARGUMENT

I

THE TERM "WAYS IMMEDIATELY ADJOINING" HAS A CLEAR, UNEQUIVOCAL AND DISTINCT MEANING.

Appellee's brief asserts that the terminology used in the Appellant's exclusion clause is ambiguous and uncertain (Appellee's Brief, p. 4) and that case authority in support of Appellant's position is not convincing (Appellee's Brief, p. 6).

Appellee has scrupulously avoided discussion of *United States v. Great American Indemnity Company*, 214 F. 2d 17 (9th Cir. 1954) cited in Appellant's opening brief at page 6. In that case, this Court dealt with the same phraseology and determined it to be neither

ambiguous, nor uncertain. The Court applied the clearly restrictive meaning of the phrase. 214 F. 2d at p. 19.

In *Pacific Employers Insurance Company v. Maryland Casualty Company*, *American Mutual Insurance Company*, 65 A.C. 339 (Appellee's Brief, p. 5), the California Supreme Court was concerned with the application of the principles announced by it in *Wildman v. Government Employees' Ins. Co.*, 48 Cal. 2d 31, 307 P. 2d 359, to the American Mutual policy. The *Wildman* case announced that it was public policy of the State, to require insurers to afford coverage in all situations when the vehicle is being driven with the permission and consent of the insured. Thus, it is generally agreed that as public policy, the provisions of California Vehicle Code § 16451 are incorporated into every policy of insurance.

In the *Pacific Employers* case, *supra*, American Mutual insured the owners and lessors of forklifts. An accident occurred when a forklift was being operated by an employee of the lessee of the lift. The accident occurred on the premises of the lessee. It was argued that American Mutual policy owed primary coverage as the forklift was being operated by a permissive user. American Mutual denied that it owed primary coverage on the grounds that the forklift was not being operated by a person covered by its policy and on a clause excluding application if the "accident occurs away from such premises or the ways immediately adjoining." The issue to be decided was whether American Mutual owed primary coverage of

the operations of an "independent contractor" (the forklift operator). The Court stated at 65 A.C. 344:

"Thus, the liability for the operations of independent contractors . . . would depend on whether the forklifts were 'automobiles'".

The Court found that a forklift was an "automobile" and thus the American Mutual policy was susceptible to the public policy announced in the *Wildman* case.

The Court also considered an argument by American Mutual that the *Wildman* doctrine did not apply because the policy in question was not an automobile policy. The Court responded that the label of the policy was insignificant. The Court determined that under the language of the exclusion clause "ways immediately adjoining" could include public ways. If a policy purports to provide coverage of use of a vehicle on a public highway, then it was susceptible to the public policy of the State requiring coverage for all permissive users. This seems to be the law of the *Pacific Employers* case, and nothing more. The Court's discussion of the language of the exclusion clause as cited in Appellee's brief, page 5, is to show that the policy covers use of a vehicle on a public highway. This is dicta and not necessary to the holding of the case.

The net result was that due to the anxiety of the California Supreme Court to apply the public policy of California to the case, an insurer of the lessor's premises was required to afford coverage for an accident which did not occur on those premises, on ways immediately adjoining, on a public highway, but on

the premises of the lessee, which were totally removed from those insured and clearly outside of the contemplation of the parties to the contract of insurance.

It is submitted that there is no need to rewrite the policy in the case at bar, as the clear language of the exclusion clause should be given effect.

II

ESTOPPEL IS NOT APPLICABLE TO THE CASE AT BAR.

In Appellee's brief, page 7, it is urged that Appellant is estopped from denying coverage to the insured.

A. The question of estoppel cannot be raised for the first time on appeal.

Estoppel was not set forth in Appellee's answer to the Complaint for declaratory relief. (Clerk's Transcript, p. 4.)

Fed. R. Civ. P. 8(c) specifically provides that estoppel must be affirmatively set forth as a defense in pleading to a preceding pleading.

Fed. R. Civ. P. 12(h) provides that a party waives all defenses and objections which he does not present either by motion or in his answer or reply. No motion was made by Appellee asserting the defense of estoppel prior to trial.

The issues upon which the trial is to be held are ultimately determined by the pre-trial conference order. Fed. R. Civ. P. 16 provides pertinently:

" . . . and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice . . ."

The Pre-Trial Order, dated January 12, 1966, provides that the issue is:

“Is the point at which the accident occurred a way immediately adjoining that of the Greenes’ property which would be covered under policy No. H 15-79-08 issued by plaintiff Insurance Company of North America.” (Clerk’s Transcript, p. 18.)

No amendment to this order was sought and the case proceeded to trial on this sole issue. No amendment or modification of the Pre-Trial Order was sought by Appellee during the course of the trial.

When a Pre-Trial Order is entered, it controls the subsequent course of the action, including the appeal. *Owen v. Schwartz*, 177 F. 2d 641 (D.C. Cir. 1949). In the absence of a request for modification or amendment to the pre-trial order before or during trial, it cannot be changed or attacked for the first time on appeal. *Fowler v. Crown-Zellerbach Corp.*, 163 F. 2d 773 (9th Cir. 1947); *Fernandez v. United States Fruit Company*, 200 F. 2d 415 (2nd Cir. 1952), cert. denied 72 S. Ct. 797, 345 U. S. 935, 97 L. Ed. 1363.

In the case at bar, the language of the pre-trial conference order was prepared by Appellee’s counsel. (Clerk’s Transcript, pp. 17, 18.) Both sides agreed to it and the case was tried on that basis. Estoppel should not be considered as an issue in this appeal.

B. If the Court considers estoppel to be in issue, it was not established by the record.

As first reported, the Appellant considered the accident to be minor in nature and, as such, processed medical pay claims in order to create goodwill. (RT p. 22.) When the incident was reported, the Appellant was not aware that the accident occurred away from ways immediately adjoining the insured premises. (RT pp. 20, 22, 30, 34.) Reserves for bodily injury are set up by the Appellant as a matter of course, regardless of whether there is a question of coverage or liability. (RT pp. 37, 38.)

The party relying on estoppel has the burden of showing its application by demonstrating: (1) that the party to be estopped must be apprised of the facts; (2) that he intended or reasonably expected his conduct to be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) he must have relied on the other's conduct to his detriment. *Crestline Mobile Homes Mfg. Co. v. Pacific Finance Corp.*, 54 Cal. 2d 773, 8 Cal. Rptr. 448. At the time the Appellees were notified of denial of coverage, the injured person had not filed a lawsuit, nor had any service been effected on Appellees. (Clerk's Transcript, p. 2.) There has been no showing that Appellees have acted or failed to act to their detriment. Appellant's actions at all times were consistent with the processing of a claim thought to be within the terms of the subject policy.

CONCLUSION

For the reasons stated herein and in Appellant's Opening Brief, it is respectfully prayed that the decision of the District Court be reversed and judgment entered in favor of Appellant.

Dated, San Jose, California,
December 19, 1966.

Respectfully submitted,
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CERTIFICATION

I certify that in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and in my opinion, the foregoing brief is in conformance with those rules.

MALCOLM A. KING,
Attorney for Appellant.

